No. 134, Original

IN THE
Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,
v.

STATE OF DELAWARE,
Defendant.

OPPOSITION BY THE STATE OF DELAWARE TO BP'S MOTION TO QUASH, IN PART, SUBPOENAS SERVED BY THE STATE OF DELAWARE

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BP p.l.c.'s ("BP") motion to quash seeks to deny Delaware access to documents and information that is potentially critical to Delaware's defense. Because BP can advance no compelling reason to preclude Delaware's access to these materials, its motion should be denied.

This motion arises so that BP can protect against public disclosure its efforts to persuade New Jersey to press in this Court BP's claims that Delaware lacks authority under the 1905 Compact to deny a permit for BP's proposed Crown Landing liquefied natural gas ("LNG") bulk transfer facility, which was to be located on Delaware's submerged lands. The communications between BP and New Jersey at issue in this motion are highly relevant and, indeed, are likely to be the only source of probative evidence of whether New Jersey's invocation of the Court's original jurisdiction was improper. Under this Court's precedents, Delaware is entitled to seek discovery on whether BP is directing and controlling this litigation, whether New Jersey would not have filed suit but for BP's willingness to take that role and bear New Jersey's costs (including by hiring and paying for the counsel that New Jersey preferred), and whether New Jersey knew of BP's intention to initiate litigation about the meaning of the 1905 Compact but withheld that information from the Court to strengthen its case for original jurisdiction.

BP and New Jersey unquestionably have had extensive contacts — often many times a day. It even appears that BP-paid lawyers are playing a significant role in drafting New Jersey's pleadings, whether in whole or in part. BP claims (and New Jersey generally concurs) that this material is protected from disclosure by either the work product doctrine or the attorney-client privilege, and that those protections were not waived when BP shared those materials with New Jersey (or vice versa) by virtue of the common interest doctrine. BP is wrong on all counts.

First, none of the materials communicated from BP to New Jersey was ever privileged to begin with. BP's privilege log makes clear that its work product materials were created, not in

anticipation of litigation in which *BP* would be a party, but rather for *New Jersey's* litigation here. For work product protection to attach, however, materials must have been created in anticipation of the creator's *own* litigation. But BP had previously sworn, in a June 27, 2005 declaration attached to New Jersey's initial filing, that BP was not then and never had been a party to litigation involving the 1905 Compact and would await the outcome of this case to resolve questions related to the compact. BP now claims work product protection as early as February 2005 based on its alleged anticipation of bringing suit against Delaware over the 1905 Compact even before the resolution of this case. That claim, however, is impossible to square with its July 2005 sworn declaration to this Court. In addition, BP does not specify *when* it anticipated litigating against Delaware. In any event, the law is clear that use in one's own suit must be the *primary* purpose for the creation of the materials.

With respect to the attorney-client privilege, which BP invokes for a small fraction of the logged entries, in almost all instances BP fails to carry its burden to show that the communications consisted of confidential communications between a BP lawyer *and BP as the client*. Rather, the bulk of the communications are between BP's counsel (or a BP lobbyist) and counsel for New Jersey's Governor, counsel for New Jersey generally, or New Jersey legislators and agency officials.

Second, even if any of the materials were properly designated as work product, the protection should give way under the "substantial need" doctrine. The communications at issue likely constitute the only evidence that can show whether the Court's original jurisdiction was improperly invoked by New Jersey, either because BP is the real party in interest and is directing this litigation, or because BP and New Jersey purposefully withheld essential information about

the availability of an alternative forum to litigate claims about the 1905 Compact. Even opinion work product is discoverable when, as here, it goes to such a pivotal issue in the case.

Third, even if the materials are protected by the work product doctrine or the attorney-client privilege and not discoverable under the substantial need doctrine, those protections were waived through voluntary disclosure by BP to New Jersey (or vice versa). BP cannot rely on the "common interest" doctrine because, under any prevailing standard this Court may employ, BP's and New Jersey's interests are not sufficiently aligned. New Jersey itself has asserted only "*some* commonality" between New Jersey's and BP's interests. NJ Mot. to Strike[1] 19-20 (emphasis added). In fact, BP cares only *that* Delaware lose on its claimed authority to block BP's proposed facility, while New Jersey cares *why* it wins, as it has sought relief that goes well beyond this one project. Indeed, New Jersey's interest in obtaining the greatest scope of jurisdiction possible may come into conflict with BP's interest in voiding Delaware's authority to block this particular facility. In addition, because New Jersey still has not stated that it will approve that facility, BP may find itself seeking to invalidate New Jersey's right to block the facility through separate litigation.

For any and all of these reasons, BP cannot refuse to produce the materials and communications it created for this original proceeding and disclosed to New Jersey.

STATEMENT OF FACTS

New Jersey seeks a ruling that the 1905 Compact not only grants it the exclusive right to regulate BP's proposed facility, but also generally "grants New Jersey riparian jurisdiction to regulate the construction of improvements appurtenant to the New Jersey shore of the Delaware

[1] Motion of State of New Jersey to Strike Delaware's Issues of Fact No. 1, 2, 6, 8, and 9 (Mar. 20, 2006) ("NJ Mot. to Strike").

River within the Twelve-Mile Circle, free of regulation by Delaware." NJ Pet.[2] 16-17 (Prayer for Relief); *see also id.* at 17 (seeking an order "[e]njoining the State of Delaware from requiring permits for the construction of any improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle, and further enjoining Delaware from enforcing any conditions attached to any such permits"). Delaware has preliminarily discussed New Jersey's (and BP's) misreading of the 1905 Compact in previous filings and will revisit that discussion more fully at the appropriate time. *See generally* DE Opp.[3] 35-75; DE Opp. to NJ Mot. to Strike[4] 2-7.

1. On December 7, 2004, BP applied to the Delaware Department of Natural Resources and Environmental Control ("DNREC") for a determination of whether BP's proposed LNG facility was permissible under the Delaware Coastal Zone Act ("DCZA"). DE Opp. 14; DE App.[5] 5a (Affidavit of Philip Cherry ¶¶ 11-16). In that submission, BP expressly declined to raise any challenge to Delaware's authority under the 1905 Compact to apply the DCZA, stating that "Crown Landing and BP reserve any and all rights with respect to the relative ability of the State of Delaware to regulate within the riparian jurisdiction granted under the Compact to the state of New Jersey."[6]

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[2] New Jersey's Petition for Supplemental Decree (July 28, 2005) ("NJ Pet.").

[3] Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree (Oct. 27, 2005) ("DE Opp.").

[4] Opposition of State of Delaware to Motion to State of New Jersey to Strike Delaware's Issues of Fact No. 1, 2, 6, 8, and 9 (May 5, 2006) ("DE Opp. to NJ Mot. to Strike").

[5] Appendix to Brief of the State of Delaware in Opposition to the State of New Jersey's Motion To Reopen and for a Supplemental Decree (Oct. 27, 2005) ("DE App.").

[6] *See* Memorandum from David S. Swayze and Michael W. Teichman, Parkowski, Guerke & Swayze (counsel for Crown Landing), to John A. Hughes, Secretary, DNREC, at 1 n.3 (Dec. 7, 2004) (accompanying Request for a Coastal Zone Status Decision (Nov. 30, 2004)).

On February 3, 2005, DNREC denied BP's application. *See* DE Opp. 14-15; DE App. 35a-36a. BP appealed to the Delaware Coastal Zone Industrial Control Board ("Board" or "CZICB") on February 15, 2005, and BP again expressly declined to raise any challenges it might have to Delaware's jurisdiction based on the 1905 Compact.[7] The Board unanimously affirmed the DNREC determination on April 14, 2005. *See* DE Opp. 15; DE App. 51a-61a.

BP declined to appeal the Board's decision in Delaware state court (and, ultimately, before this Court on a petition for a writ of certiorari) by challenging either the Board's interpretation of the DCZA or the Board's authority to apply that statute in view of the 1905 Compact. Instead, on May 26, 2005, BP advised the Federal Energy Regulatory Commission ("FERC") that "New Jersey would undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permits" for the Crown Landing project. NJ App.[8] 141a-142a (Declaration of Crown Landing Vice-President Lauren B. Segal ¶ 21 ("Segal Decl.")).

Unknown to Delaware until recently, following the February 2005 denial of the DCZA permit, BP and New Jersey engaged in "numerous" communications with each other. BP Mot. to Quash 5. Initially, New Jersey spoke with attorney Stuart Raphael about representing the State, but declined to do so, after which Mr. Raphael was hired (apparently almost immediately) by BP. *See id.* Mr. Raphael, however, continued to provide extensive legal advice and work product to New Jersey for use in this litigation, including numerous contacts in the weeks leading up to the July 28, 2005 filing of this case by New Jersey. According to a privilege log

[7] *See* Memorandum of Law of Appellant Crown Landing, LLC at 1 n.1, *Coastal Zone Act Status Decision published February 3, 2005 in Respect of the Application of the Crown Landing LLC*, Docket No. 2005-1 (CZICB filed Mar. 23, 2005).

[8] Appendix to New Jersey's Motion To Reopen and for a Supplemental Decree (July 28, 2005) ("NJ App.").

transmitted by BP to Delaware on April 25, 2006,[9] BP attorneys communicated on an almost daily basis with New Jersey counsel, often on multiple occasions per day, in the months prior to New Jersey formally launching this action in this Court. *See* Priv. Log 14-177; *see also* Priv. Log 29-36 (eight communications in one day), 56-76 (21 communications over two consecutive days). The privilege log also indicates that BP lawyers were, at a minimum, drafting work product for submission to this Court, *see id.* 38, 61, 77, 93, reviewing drafts of New Jersey's filings, *see id.* 66, sharing their views of case strategy, *see id.* 32, 34, 36-38, 72, 88, 127, 134, 150, 164, 178, 237, 251, 253, 255-256, 261, and disseminating strategy to New Jersey legislative officials, *see id.* 4, 6, 50, 52-53, 104.

2. On July 28, 2005, New Jersey filed this case challenging Delaware's authority under the 1905 Compact to regulate projects appurtenant to the New Jersey shore within the twelve-mile circle. New Jersey's filing included a declaration from Crown Landing Vice-President Lauren Segal, which stated that "Crown Landing is not, and has never been, a party to any proceeding in which it has attempted to obtain a ruling concerning New Jersey's rights under the Compact of 1905." NJ App. 142a (Segal Decl. ¶ 23). Indeed, that declarant went so far as to state that "Crown Landing is awaiting the outcome of this case to resolve whether Delaware has any riparian jurisdiction over the Project." *Id.*

Delaware opposed New Jersey's pleading on numerous grounds, including that original jurisdiction was lacking because, *inter alia*, BP rather than New Jersey is the real party in

[9] The privilege log ("Priv. Log") is attached, along with two accompanying declarations and a cover letter dated April 25, 2006, as Exhibit D to BP's motion to quash. BP designated both declarations and the privilege log as "confidential." Delaware contested that designation. *See* Motion of State of Delaware to Strike BP's Designation of Its Privilege Log and Supporting Declarations as Confidential (May 17, 2006) ("DE Mot. to Strike"). BP withdrew that confidentiality designation on June 5, 2006.

interest, and BP and New Jersey declined to avail themselves of the alternative forum presented by appeal of the Board's decision affirming denial of the DCZA permit. *See* DE Opp. 25-35.

On November 28, 2005, this Court granted New Jersey's alternative request to treat its pleading as a bill of complaint; docketed this case as No. 134, Original; and permitted Delaware to file an answer. *See* 126 S. Ct. 713 (2005). The Court's four-sentence order did not address either party's arguments concerning jurisdiction or the merits of the case. Delaware reserved its objections to jurisdiction in its answer, *see* Answer of State of Delaware ¶ 2 (Dec. 28, 2005), and moved concurrently for the appointment of a special master, *see* Motion for Appointment of Special Master (Dec. 28, 2005). The Court granted the motion over New Jersey's objection and appointed the Special Master on January 23, 2006. *See* 126 S. Ct. 1184 (2006).

3. On March 6, 2006, Delaware served Rule 45 subpoenas seeking production of documents by six BP entities (the "subpoenas" or "BP subpoenas").[10] The subpoenas sought information on New Jersey's asserted jurisdictional basis for this proceeding, as well as New Jersey's claims on the merits.[11] Counsel for Delaware and BP met and conferred multiple times, *see* BP Mot. to Quash 6 ("a series of amicable telephone conferences"), and BP produced several thousand pages of documents pertaining solely to the nature of the proposed Crown Landing facility and that had been filed with FERC or state permitting authorities. *See id.* BP, however, objected to providing any communications between it and New Jersey, asserting that (1) they

[10] Because all six subpoenas contain identical requests for the production of documents, only the Crown Landing subpoena, which is representative of the other five, is attached hereto as Attachment 1.

[11] *See, e.g.*, Subpoena, Exh. A at 2 (¶ 5) (issued Mar. 6, 2006) (requesting "any communications and correspondence with New Jersey concerning or informing Crown Landing's 'understanding' of the 'action' that 'New Jersey would undertake'" to defeat Delaware's assertion of jurisdiction over the Crown Landing project); *id.* at 3 (¶ 11) (requesting all documents "referring, reflecting, or relating to any agreements or contracts (formal or informal) with New Jersey relating to the proposed Crown Landing Facility or *New Jersey v. Delaware*, and any actual, promised, or proposed payments associated with either").

consisted of work product or attorney-client materials and (2) disclosure to New Jersey did not waive either protection based on the "common interest" doctrine. *See id.* at 6-7.

Despite BP's affiant's prior statement that "Crown Landing is awaiting the outcome of this case to resolve whether Delaware has any riparian jurisdiction over the Project," NJ App. 142a (Segal Decl. ¶ 23), BP also justified its refusal to produce these documents on the ground that it "anticipates being a party to future litigation with the State of Delaware (*potentially prior to the resolution of this litigation*) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation." BP Response to Rule 45 Subpoenas at 6, 7, 8, 10, 11, 12, 13 (Mar. 21, 2006) (emphasis added).

4. On April 21, 2006, BP contacted Delaware and confirmed that BP would produce a privilege log for Delaware's review. *See* BP Mot. to Quash, Exh. C. As BP acknowledged in that letter, the log was produced so that Delaware could assess the validity of BP's claims of both (1) privilege and (2) non-waiver. *See id.* at 3 (agreeing to log communications "that we contend are privileged and subject to the common interest rule").

On April 25, 2006, BP provided a privilege log containing 264 entries describing communications between BP representatives and New Jersey from February 10, 2005, through January 23, 2006 (the date the Court appointed the Special Master). *See* BP Mot. to Quash, Exh. D. (Delaware maintains its contention that post-January 23, 2006 materials are also relevant.) BP's privilege log was accompanied by the declarations of two of BP's outside counsel.

5. Following receipt of BP's privilege log, Delaware disputed BP's assertion of the common interest doctrine, including on the ground that the materials for which BP claimed an underlying privilege were not created for litigation in which BP itself was a party, but rather for

New Jersey's use in this litigation. On May 17, 2006, BP filed its motion to quash the subpoenas in part based on its invocation of the common interest doctrine.[12]

ARGUMENT

In resisting the production of subpoenaed documents based on a claim of privilege, "the party who invokes the privilege bears the burden of establishing that it applies to the communications at issue and that it has not been waived." *In re Keeper of Records*, 348 F.3d 16, 22 (1st Cir. 2003); *see also, e.g.*, *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). Failure to carry this burden "may be deemed a waiver of the underlying privilege claim." *In re Application for Subpoena to Kroll*, 224 F.R.D. 326, 328 (E.D.N.Y. 2004).

Even if a document is properly designated as privileged, however, "waiver occurs when a party claiming the privilege has *voluntarily* disclosed confidential information on a given subject matter to a party not covered by the privilege." *Hanson v. United States Agency for Int'l Dev.*, 372 F.3d 286, 294 (4th Cir. 2004). While the "common interest" doctrine relied on by BP provides an exception to that waiver-by-disclosure principle in certain limited circumstances, it does not itself create any privilege. Rather, "as an exception to waiver, the joint defense or common interest doctrine *presupposes* the existence of an otherwise valid privilege." *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (emphasis added).

[12] In that motion, BP chastised Delaware for seeking to publicize the activities of New Jersey government officials and argued that Delaware's discovery requests and related briefing were "intended to score political and public relations points, rather than to illuminate the matters in controversy." BP Mot. to Quash 9-10. However, as explained in detail elsewhere, it is BP and New Jersey that have attempted to manipulate the public by hiding details of their relationship and designating BP's privilege log as "confidential," despite the strong public interest in public examination of such materials. *See* DE Mot. to Strike 14-17.

I. BP HAS FAILED TO MEET ITS BURDEN TO DEMONSTRATE PRIVILEGE

In construing the scope of any privilege (as well as the common interest doctrine), this Court has instructed that courts "do not create and apply an evidentiary privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence," because "testimonial exclusionary rules and privileges contravene the fundamental principle that the public has a right to every man's evidence"; therefore, "any such privilege must be *strictly construed*." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (emphasis added; internal quotation marks and alteration omitted).[13]

A. BP Has Failed To Justify Its Work-Product Designations Because The Materials Created By BP And Communicated To New Jersey Were Created Primarily For New Jersey's Litigation, Not BP's

BP claims that the work product doctrine applies to each of the 148 logged entries of material created by BP attorneys and transmitted to New Jersey.[14] To sustain that assertion, BP must show that the documents it seeks to withhold were "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495, 511 (1947)

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[13] *See also In re Keeper of Records*, 348 F.3d at 22 ("[T]he attorney-client privilege must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth."); *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000) (attorney-client privilege "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle") (internal quotation marks omitted); *In re Grand Jury Proceedings*, 604 F.2d 798, 802-03 (3d Cir. 1979) ("[B]ecause the [work product] privilege obstructs the search for truth and because its benefits are, at best, indirect and speculative, it must be strictly confined within the narrowest possible limits consistent with the logic of its principle.") (internal quotation marks omitted); *United States v. Lofton*, 957 F.2d 476, 477 (7th Cir. 1992) ("Evidentiary privileges must be construed narrowly to protect the search for truth.").

[14] One hundred fourteen other communications are from New Jersey to BP, which are subject to waiver of the privilege by New Jersey, *see infra* Part III.A, and in any event should be produced under the "substantial need" exception to the work product doctrine, *see infra* Part II. The remaining two communications in the 264 logged entries are discussions between Mr. Raphael and New Jersey regarding the possibility of Mr. Raphael representing New Jersey in this original proceeding, which we acknowledge are subject to the attorney-client privilege. *See infra* note 27.

("materials obtained or prepared by an adversary's counsel with an eye toward litigation"). But preparation of materials specifically for *New Jersey's* litigation does not meet that test; rather, the work product must have been prepared for litigation in which *BP* would be a party. Moreover, because litigation is *always* a possibility in some abstract sense, for the work product protection doctrine to apply the "party must show more tha[n] a remote prospect, an inchoate possibility, or a likely chance of litigation." *United States v. Ernstoff*, 183 F.R.D. 148, 155 (D.N.J. 1998) (internal quotation marks omitted).[15] Otherwise, almost any work product could be claimed to have been prepared in anticipation of litigation, contrary to the overriding principle that privileges are to be applied narrowly. *See University of Pennsylvania*, 493 U.S. at 189.

Thus, the "essential element" in a work product claim "is that the attorney was preparing for or anticipating some sort of adversarial proceeding *involving his or her client*." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 (8th Cir. 1997) (emphasis added). The Eighth Circuit there rejected the district court's work product finding with respect to materials prepared by the White House Counsel's Office in preparation for litigation involving the First Lady and not litigation involving its client, the White House. As that court explained, there is "no authority allowing a client such as the White House to claim work product immunity for materials merely because they were prepared while some other person . . . was anticipating litigation." *Id.* There is no work product protection, therefore, for materials created for *someone else's* litigation: "[d]ocuments prepared for one who is not a party to the present suit are *wholly*

[15] *See also McCoo v. Denny's Inc.*, 192 F.R.D. 675, 683 (D. Kan. 2000) (party claiming work product privilege "must show that the threat of litigation was real and imminent," as "[t]he inchoate possibility, or even the likely chance of litigation, does not give rise to the privilege") (internal quotation marks omitted); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 449 (S.D.N.Y. 1995) (requiring a probability of "imminent" litigation); *City of Virginia Beach v. United States Dep't of Commerce*, 805 F. Supp. 1323, 1328 (E.D. Va. 1992) ("[T]he mere possibility of litigation is not sufficient to activate the privilege."), *aff'd in part, rev'd in part on other grounds*, 995 F.2d 1247 (4th Cir. 1993).

unprotected by Rule 26(b)(3) even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit." 8 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 2024, at 354 (2d ed. 1994) ("Wright") (emphasis added); *see also In re California Pub. Utils. Comm'n*, 892 F.2d 778, 781 (9th Cir. 1989) (work product protection is available only to "one who is a party (or a party's representative) to the litigation in which discovery is sought") (citing Wright treatise).[16]

1. BP Does Not (and Cannot) Claim That It Prepared Work Product in Anticipation of Being a Party to No. 134, Original

BP makes no claim that it anticipated being a party to No. 134, Original. Despite being a driving force behind New Jersey's litigation, BP has not sought to intervene and, indeed, could not reasonably have anticipated being able to do so. *See, e.g.*, *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam) (private individuals and organizations ordinarily "have no right to intervene in an original action") (citing *New Jersey v. New York*, 345 U.S. 369, 373-75 (1953) (per curiam)).[17] Instead, in its statements to FERC, and in its declaration filed by New Jersey in

[16] *See also Bohannon v. Honda Motor Co.*, 127 F.R.D. 536, 539 (D. Kan. 1989) ("work product status does not apply to documents submitted to or received from a third party"); *In re Asousa P'ship*, No. 01-12295DWS, 2005 WL 3299823, at *3 n.6 (Bankr. E.D. Pa. Nov. 17, 2005) (refusing to apply work product protection where "the subject matter of the memo is clearly the Pennexx Litigation, to which Smithfield was not a party, belying the assertion that Smithfield created the memo in anticipation of litigation," and where "Smithfield failed to provide any factual basis that, at the time this memo was written, there was a reasonable anticipation of litigation *against Smithfield"*) (emphasis added); *Ramsey v. NYP Holdings, Inc.*, No. 00 Civ. 3478, 2002 WL 1402055, at *10 n.8 (S.D.N.Y. June 27, 2002) (materials possibly created by private party to aide government's criminal prosecution were not created in "anticipation of litigation," because the private parties "would not be parties to the prosecution"); *Kirschbaum v. Insignia Commercial Group, Inc.*, No. Civ. A. 97-CV-5532, 1998 WL 321273, at *1 (E.D. Pa. June 18, 1998) ("Documents created on behalf of a non-party are not protected by the work product rule. The rule exists to protect the privacy of the preparations of the attorneys and agents engaged in litigation.").

[17] Indeed, BP's counsel, representing the Commonwealth of Virginia in a previous original action (*see* BP Mot. to Quash 5), successfully opposed the participation of the Audubon Society as *amicus curiae*. *See* Virginia's Brief in Opp. to Mot. of Audubon Naturalist Society

this Court, BP indicated that it was *forgoing* its own litigation challenging Delaware's authority under the 1905 Compact and that instead "New Jersey would undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permits," adding that "Crown Landing is *awaiting the outcome* of this case to resolve whether Delaware has any riparian jurisdiction over the Project." NJ App. 141a-142a (Segal Decl. ¶¶ 21, 23) (emphasis added).

2. BP's Claim That It Prepared Work Product for New Jersey in Anticipation of BP's Own Litigation in Other Forums Is Untenable

BP now asserts that it "anticipates being a party to future litigation with the State of Delaware (potentially prior to the resolution of this litigation) in which BP will assert that Delaware lacks jurisdiction over the Crown Landing Facility under the Compact of 1905, an issue to be decided in this litigation." BP Response to Rule 45 Subpoenas at 6, 7, 8, 10, 11, 12, 13. Specifically, BP asserts (at 7-8) that it may challenge the necessity of Delaware permitting as a condition of compliance with the Federal Coastal Zone Management Act of 1972 and the Clean Water Act. In addition, BP claims (at 8) that it "is presently considering filing an action against Delaware to establish that it is not required to obtain either [Delaware Subaqueous Land Act] or DCZA permits for the Project." Moreover, although BP does not state when it anticipated this litigation, it is claiming work product protection for documents created in February 2005. Such an assertion implies that BP anticipated such litigation at *that* point, because a *present* anticipation of such litigation could not be used retroactively to attain work product protection for previously created documents exchanged with New Jersey.

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for Leave to Participate as Amicus Curiae at 6, No. 129, Orig. (Oct. 9, 2000) ("an intervenor or codefendant cannot raise his own views or arguments about an interstate compact").

BP's conflicting claims, therefore, appear to be part of a strategic decision to induce the Court to exercise its original jurisdiction over this case. The Supreme Court's role as the final arbiter of interstate compacts does not mean that original jurisdiction exists any time a State files litigation with respect to a compact. The Court has explained that it "exercise[s] [its] jurisdiction sparingly and [is] particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada*, 412 U.S. at 538; *see generally* DE Opp. 25-35. BP presumably had Crown Landing's Vice-President declare that "Crown Landing is not, and has never been, a party to any proceeding in which it has attempted to obtain a ruling concerning New Jersey's rights under the Compact of 1905" and that "Crown Landing is awaiting the outcome of this case to resolve whether Delaware has any riparian jurisdiction over the Project" to enable New Jersey to invoke this Court's original jurisdiction; New Jersey certainly relied on those representations for precisely that purpose. NJ App. 142a (Segal Decl. ¶ 23); *see* NJ Reply Brief in Support of Mot. to Reopen and for a Supplemental Decree 9-10 (Nov. 8, 2005) (citing NJ App. 142a).

As Delaware noted in its opposition (at 14) to New Jersey's motion to strike, the conflict between BP's current claims and the declaration it provided to New Jersey strongly suggests that BP, with New Jersey's knowledge, refrained from informing the Court about its anticipated litigation — and perhaps from filing such litigation — because such litigation would provide an alternative forum for resolving claims regarding the interpretation of the 1905 Compact, and whether Delaware's exercise of regulatory jurisdiction over BP's project is consistent with the Compact. Such litigation by BP would be fatal to New Jersey's attempt to invoke this Court's original jurisdiction. *See, e.g.*, *Illinois v. Michigan*, 409 U.S. 36, 37 (1972) (per curiam) ("[O]riginal jurisdiction . . . is not an alternative to the redress of grievances which could have

been sought in the normal appellate process, if the remedy had been timely sought."). Tellingly, BP challenges two alleged "misstatements" in Delaware's opposition to New Jersey's motion (*see* BP Mot. to Quash 9-10), but it does not deny that it acted in concert with New Jersey to withhold this information from the Court and to refrain from filing any suit of its own so that New Jersey could seek to invoke this Court's original jurisdiction in this case. *See* DE Opp. to NJ Mot. to Strike 13-14. New Jersey, in its reply brief, does not deny that it knew of BP's intention to file its own litigation or that it intentionally withheld that information from the Court, instead claiming only that such information would not have been relevant to the Court's decision to accept jurisdiction. *See* NJ Reply[18] 15-16. That determination, however, was plainly one for the Court to make.

BP's current assertion that it was anticipating the same type of litigation that it disavowed in its July 2005 declaration filed with the Court therefore is unpersuasive. Moreover, BP never states precisely *when* it developed the anticipation of litigation that it now asserts, a fact necessary for its assertion of privilege. If BP means to claim that it developed such an anticipation prior to the July 2005 Segal Declaration, then for the reasons stated above such a claim cannot be credited. If, on the other hand, BP means to represent that it developed its claimed anticipation of litigation sometime thereafter, then it has failed to carry its burden to substantiate both the fact and the timing of such anticipated litigation. BP has therefore failed to carry its burden to demonstrate that the work product protection applies to *any* of the 148 logged communications from BP to New Jersey.[19]

[18] New Jersey's Reply Brief in Support of Its Motion to Strike Delaware's Issues of Fact No. 1, 2, 6, 8, and 9 (May 22, 2006) ("NJ Reply").

[19] At a minimum, the work product privilege cannot apply to the 99 logged communications from BP to New Jersey prior to July 27, 2005, the date of the Segal Declaration.

3. In Any Case, BP Plainly Created the Work Product Materials Primarily for New Jersey's Litigation, Not Its Own Litigation

Even if BP — at some point — reasonably anticipated litigation with Delaware over the 1905 Compact, that still would not be sufficient to invoke the work product doctrine for the logged materials. Materials created primarily for New Jersey are not protected work product merely because parts of those materials might be useful in some future litigation involving BP. Numerous cases addressing the situation where a litigant has created materials that could be used both for that entity's present or future litigation and for a business or other non-litigation purpose hold that work product protection does not apply unless the party's own anticipated litigation was "the *primary motivating purpose*" behind the creation of a document. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 190 F.R.D. 532, 535 (S.D. Ind. 1999); *see also Cooper Hosp./Univ. Med. Ctr. v. Sullivan*, 183 F.R.D. 119, 133 (D.N.J. 1998) (denying work product protection where "the primary motivation for drafting the report was not in anticipation of litigation"); *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 485 (D. Kan. 1997) ("The primary or motivating purpose for the preparation of the document must be to assist in pending or anticipated litigation."). BP must therefore demonstrate that its asserted work product was created primarily for *BP's* own, allegedly anticipated litigation, and not for this case.

As the facts are now developed, BP cannot make that showing. The timing of BP's creation of the asserted work product coincides precisely with New Jersey's filing. That fact strongly suggests that the primary purpose for which those documents were created was this case, and not some other, future case in which BP is a party. Moreover, the log entries show that BP did not create these materials primarily (if at all) for its own anticipated litigation as a party. All of the communications from BP to New Jersey fall into one (or more) of the following four categories:

First, BP's privilege log indicates that BP and its counsel played a substantial role in drafting the very submissions submitted by New Jersey to the Court. Any materials created by BP in that effort were created specifically (and at least primarily) for New Jersey's own litigation, and not BP's.[20]

Second, log entries reflect BP providing strategic advice to New Jersey with respect to this litigation, again showing that the primary purpose of these documents was not for use in any subsequent BP litigation. Thus, many of the communications withheld as "work product" appear to provide comments on New Jersey's draft pleadings.[21] Indeed, these entries show that BP was involved to a large degree in directing or guiding New Jersey's litigation strategy.

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[20] *See*, *e.g.*, Priv. Log 38, 61 (providing work product "for possible court submission"), 67, 77 (providing work product for "court submission"), 88 (providing "selected documents" for court submission), 93 ("transmitting work product for possible court submission" and "discussing edits to same"), 127 ("transmitting additional work product relating to court submission"), 134 ("transmitting comments and work product relating to court submission"), 141 ("transmitting selected documents for inclusion in court submission" and "commenting on possible revisions to same"), 145 ("transmitting input to work product relating to NJ affidavit for court submission" and "explaining reasons for revision to same"), 164 ("discussing litigation strategy regarding possible Delaware position, and attaching related input to work product on court submission on dispute"), 219 ("transmitting attorney work product on court submission in original action"), 220 (same), 221 (same, and "explaining one of the referenced documents"), 222-223 (transmitting documents for inclusion in New Jersey's filing), 226 (attaching and commenting on "selected document for possible court submission in original action"), 235 (attaching work product on original action submission), 239 ("commenting on work product on court submission in original action" and "transmitting BP counsel's work product on same"), 255 ("transmitting work product on court submission in original action" and "providing analysis of strategy for filing same"), 257 ("transmitting work product on court submission in original action" and "commenting on/explaining same"), 261 ("transmitting work product on court submission in original action" and "commenting on/explaining strategy for same").

[21] *See* Priv. Log 47-48 ("transmitting documents prepared by BP consultant D. Belin for possible use in original action litigation"), 178 ("providing mental impressions of effect of extension of deadline for Delaware's responsive brief on litigation strategy"), 216 ("commenting on Delaware court submission in original action"), 219 ("transmitting attorney work product on court submission in original action"), 220 ("transmitting attorney work product relating to court submission in original action" and "commenting on same"), 237 ("explaining reasoning/strategy for particular work product on court submission in original action"), 241 ("providing links to Supreme Court website pages and providing attorney mental impression on relevance of same to

Third, numerous log entries are for communications apparently designed to lobby New Jersey to pursue an original action. Thus, a lobbyist retained by BP (*see* http://www.ppag.com) sent emails to a New Jersey official "inquiring about status of NJ's position on Delaware regulatory proceedings" and "inquiring about NJ position" on that issue as well as an "original action against Delaware." Priv. Log 4, 6, 8. Communications between BP's lobbyist or its attorneys, on the one hand, and New Jersey officials, on the other, cannot be withheld as work product because they were not created in anticipation of BP's participation in any litigation, as BP could not contemplate participating in No. 134, Original. *See also* Priv. Log 1, 3. Similarly, communications between BP's lobbyist and New Jersey legislative officials seeking *legislation* cannot be withheld as work product created in anticipation of *litigation*. *See* Priv. Log 50, 52-53, 104 (discussing legislation relating to 1905 Compact); *cf. In re Grand Jury Subpoenas*, 179 F. Supp. 2d 270, 274, 289-90 (S.D.N.Y. 2001) (no protection for documents related to seeking a presidential pardon, because the attorneys "were acting principally as lobbyists and not primarily as lawyers").

Fourth, the remainder of BP's communications with New Jersey appear to fall within the previous categories, although BP's descriptions are highly vague. At a minimum, those descriptions do not suggest — much less demonstrate — that the primary purpose for which BP created those documents was some future litigation initiated by BP, rather than New Jersey's

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litigation strategy"), 255 ("transmitting work product on court submission in original action" and "providing analysis of strategy for filing same"), 257 ("transmitting work product on court submission in original action" and "commenting on/explaining same"), 261 ("transmitting work product on court submission in original action" and "commenting on/explaining strategy for same"), 262-263 (discussing schedule for Supreme Court conferences, and implications of that schedule for original action).

original action here.[22] Because the descriptions in BP's privilege log are too vague to ascertain the nature or purpose of these materials, BP has failed to meet its burden to show they were created primarily in anticipation of litigation in which BP — not New Jersey — would be a party.

Both BP (at 15-17, 24) and New Jersey (at 5-6) rely heavily on *United States v. AT&T Co.*, 642 F.2d 1285 (D.C. Cir. 1980). In that case, however, the materials that MCI provided to the government were created in the prosecution of its own private antitrust case against AT&T. Moreover, while the government already had the documents before receiving them from MCI, it sought to make those documents more usable by gaining access to the database that MCI created for use in its own litigation. *See id.* at 1289. The work product that was protected in that case — and to which the common interest doctrine was applied — were documents and information that MCI created primarily for its own case, before turning them over to the government. Here, by contrast, BP claims work product protection for documents created for New Jersey's litigation, including comments and advice on drafts of the very pleadings filed by New Jersey. *United States v. AT&T*, therefore, provides no support for BP's and New Jersey's claims here.

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[22] *See* Priv. Log 27 ("transmitting BP counsel's work product regarding portions of FERC data request that implicate NJ's regulatory rights under 1905 Compact"), 34 ("discussing work product and further litigation strategy"), 54 ("transmitting document of possible interest regarding dispute with Delaware"), 121 ("transmitting work product relating to sample statement concerning court filing against Delaware"), 132 ("Communication from BP counsel to NJ counsel attaching requested documents"), 147 ("Communication from BP counsel to counsel to NJ Governor in response to inquiry about statement by NJAG's office concerning court filing against Delaware"), 199 ("Communication from BP counsel to NJ counsel confirming legal advice attendant to production of documents requested by Delaware and requesting coies of produced documents"), 221 (discussing "documents for court submission in original action against Delaware and attaching and explaining one of the referenced documents"); *see also* Priv. Log 14, 15, 18, 21, 23-26, 28, 30-32, 36-37, 39, 41, 43, 45, 49, 55, 58, 64, 69-70, 72, 74-75, 78, 81-82, 84, 86, 91-92, 94-95, 98, 101, 103, 107-108, 111, 113, 116, 118-120, 123-124, 126, 130-131, 135, 138, 140, 143-144, 148, 150-151, 153-154, 157, 159, 160, 162, 165-166, 168, 172, 174, 180-181, 183-187, 190, 194, 196, 201-204, 207, 209, 211, 214, 218, 224, 227-228, 230, 232, 244, 248-249, 251, 253, 256, 258.

Given BP's failure to satisfy its burden of demonstrating that its communications with New Jersey qualify for work product protection, they must be produced.

B. BP Has Failed To Justify Its Attorney-Client Privilege Designations

To invoke the attorney-client privilege, BP must demonstrate (1) a communication, (2) between client and counsel, (3) which was intended to be and was in fact kept confidential, and (4) was made for the purpose of obtaining or providing legal advice. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389-90 (1981). Communications made without a reasonable expectation of continued confidentiality are not protected. *See, e.g.*, *United States v. Pelullo*, 5 F. Supp. 2d 285, 289 (D.N.J. 1998), *aff'd*, 185 F.3d 863 (3d Cir. 1999) (table).

BP invokes the attorney-client privilege for 43 of the 264 communications contained in its privilege log. For the vast majority of those communications, BP has failed to establish that the privilege attaches. Many of BP's attorney-client privilege designations are evidently applied to communications made outside the attorney-client relationship; at a minimum, BP has not met its burden to show that the communications involved confidential communications between a BP attorney and the client.

First, the privilege cannot attach to communications back and forth between BP's lobbyist, on the one hand, and a New Jersey legislator or Department of Environmental Protection Commissioner, neither of whom plausibly can be thought to have represented BP's own lobbyist in an attorney-client relationship.[23] Neither BP nor New Jersey has demonstrated

[23] *See* Priv. Log 4 ("Communication from BP representative to NJ official attaching communication from BP counsel"), 5 ("Communication from NJ official to BP representative"), 6 ("Communication from BP representative to NJ official forwarding communication between BP and its counsel"), 7 ("Communication from NJ official to various NJ officials, counsel to NJ Governor and BP representative"), 8 ("Communication from BP representative to NJ official"), 9 ("Communication from NJ official to various NJ officials and BP representative"), 50 ("Communication from BP representative to NJ legislator discussing legislation and common

that communications made by or to BP's lobbyist were made with an expectation of continued confidentiality. Absent such a showing, no privilege can attach to these communications. *See, e.g., United States v. BDO Seidman*, 337 F.3d 802, 812 (7th Cir. 2003) (recognizing that the "expectation of confidentiality" is "an essential element of the attorney-client privilege") (emphasis added); *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) ("[T]he burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it.").

Second, BP has likewise claimed the privilege for communications back and forth between BP's counsel and counsel for another party, with no involvement by any client. This includes communications between BP's counsel and counsel for the Governor of New Jersey.[24]

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legal interest"), 51 ("Communication from NJ legislator to BP representative"), 52 ("Communication from BP representative to NJ legislator"), 53 ("Communication from BP representative to NJ legislator transmitting attorney work product relating to proposed legislation and strategy regarding dispute with Delaware"), 104 ("Communication from BP representative to NJ legislator transmitting attorney work product and advice relating to legislation and dispute with Delaware"), 105 ("Communication from NJ legislator to BP representative"). Three of these entries claim in addition to transmit bona fide attorney-client communications and therefore may be privileged to that limited extent. *See* Priv. Log 4, 6, 104; *see also* Priv. Log 89 ("Communication from counsel to NJ Governor to BP counsel forwarding communications (e-mail string) among various NJ counsel about discussions with BP counsel and follow-up inquiry regarding litigation strategy in dispute with Delaware"). The remainder of those communications would of course not be protected by the attorney-client privilege.

[24] *See* Priv. Log 10 ("Communication from counsel to NJ Governor to BP representatives"), 40 ("Communication from counsel to NJ Governor to BP counsel forwarding 6/2/2005 e-mail exchange among NJ personnel"), 42 ("Communication from counsel to NJ Governor to BP counsel regarding mechanism for providing access to work product"), 43 ("Communication from BP counsel to counsel to NJ Governor"), 45 ("Communication from BP counsel to counsel to NJ Governor"), 55 ("Communication from BP counsel to NJ counsel and counsel to NJ Governor regarding BP's position on certain legislation relation [*sic*] to compact dispute and attaching same"), 89 ("Communication from counsel to NJ Governor to BP counsel forwarding communications (e-mail string) among various NJ counsel about discussions with BP counsel and follow-up inquiry regarding litigation strategy in dispute with Delaware"), 121 ("Communication from BP counsel to counsel to NJ Governor transmitting work product relating to sample statement concerning court filing against Delaware"), 122 ("Communication from counsel to NJ Governor to BP counsel in response to previous e-mail regarding statement

It also includes communications between BP's counsel and counsel for New Jersey.[25] Communications between counsel representing *different* clients — with no involvement by either client — are not privileged. *See, e.g.*, *Upjohn*, 449 U.S. at 389-90.[26]

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concerning court filing against Delaware and inquiring about NJAG office's actions"), 123 ("Communication from BP counsel to counsel to NJ Governor responding to previous inquiry"), 146 ("Communication from counsel to NJ Governor to BP counsel inquiring about statement by NJAG's office concerning court filing against Delaware") 147 ("Communication from BP counsel to counsel to NJ Governor in response to inquiry about statement by NJAG's office concerning court filing against Delaware"), 149 ("Communication from NJAG's office to BP counsel, counsel to NJ Governor and NJ Governor's office transmitting work product relating to proposed statement by NJAG's office in connection with litigation against Delaware"), 154 ("Communication from BP counsel to counsel to NJ [Governor] re statement regarding litigation with Delaware"), 155 ("Communication from counsel to NJ Governor to BP counsel acknowledging receipt of input in prior e-mail (attaching prior email string").

[25] Priv. Log 14 ("Communication from BP counsel to NJ counsel"), 26 ("Communication from BP counsel to NJ counsel transmitting FERC data request and providing mental impressions of relevance of same"), 39 ("Communication from BP counsel to NJ counsel attaching work product relating to BP/Crown Landing (Lauren Segal) declaration for court submission"), 49 (same), 56 ("Communication from NJ counsel to BP counsel transmitting work product relating to NJ declarations for court submission"), 81 ("Communication from BP counsel to NJ counsel transmitting work product relating to BP/Crown Landing declaration for court submission"), 103 ("Communication from BP counsel to NJ counsel transmitting work product relating to BP/Crown Landing (Lauren Segal) declaration for court submission"), 124 ("Communication from BP counsel to NJAG's office transmitting contact information and copy of work product concerning court filing against Delaware"), 125 ("Communication from NJAG's office to BP counsel acknowledging receipt of prior email (with prior email string)"), 156 ("Communication from NJAG's office to BP counsel transmitting work product relating to proposed statement regarding litigation with Delaware, commenting on input to same and soliciting comments on same"), 157 ("Communication from BP counsel to NJAG's office providing input on work product relating to statement regarding litigation with Delaware"), 158 ("Communication from NJAG's office to BP counsel acknowledging prior e-mail (attaching prior email string)"), 176 ("Communication from NJ counsel to BP counsel attaching work product relating to NJ affidavit for court submission in dispute with Delaware over 1905 Compact"), 177 ("Communication from NJAG's office to BP counsel attaching work product relating to statement regarding litigation with Delaware").

[26] BP's invocation of the common interest doctrine does not alter the rule that attorney-client privilege attaches only to communications between attorneys and clients. The common interest doctrine merely precludes waiver when a confidential communication, originally between an attorney and client for the purpose of obtaining legal advice, is later revealed to a third party with a sufficiently common interest. However, non-privileged communications disclosed to third parties with common interests are not, by virtue of that disclosure (or subsequent repetition to an attorney or client), privileged communications. *See In re Grand Jury*

BP's assertions of attorney-client privilege for these materials cannot be based — as appears to be the case — on the presence of a BP official in the "cc" line of those emails. *See* Priv. Log 26, 39, 49. The attorney-client privilege does not attach from the nominal inclusion of a client or an attorney in communications not directed to that party for the purpose of requesting or providing legal advice. It is well established that materials are not shielded from production because a party "is 'copied in' on correspondence or memoranda." *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997); *see also United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994) ("A corporation cannot be permitted to insulate its files from discovery simply by sending a 'cc' to in-house counsel.").

Accordingly, with very limited exceptions,[27] BP has failed to carry its burden to demonstrate applicability of the attorney-client privilege.

II. PRODUCTION OF WORK PRODUCT IN ANY CASE IS JUSTIFIED ON THE BASIS OF SUBSTANTIAL NEED

The work product doctrine offers only qualified protection from discovery. Work product must be produced upon a showing of "substantial need" for the privileged materials.

Testimony of Attorney X, 621 F. Supp. 590, 592 (E.D.N.Y. 1985) ("But the information that the third party attorney conveyed to the Attorney and that he conveyed to his client was not confidential. This is not a case where the client of an attorney told him in confidence facts that the attorney then relayed to another attorney whose client was also subject to grand jury investigation. . . . The addition of another attorney to the chain of communicators does not change the non-confidential nature of the information transmitted."); *see also* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:35, at 203-05 (2d ed. 1999) (noting that, when the joint defense or common interest doctrine applies, privileged communications "can be between any of the clients and attorneys, regardless of whether the communicating client's own counsel is present or between any of the attorneys. For the protection to apply, however, *the communications must reveal prior confidential communications from the clients that would otherwise be protected under the privilege*.") (emphasis added; footnotes omitted).

[27] At most, BP has demonstrated that the privilege attaches to two communications, *see* Priv. Log 11 (discussions between Stuart Raphael and New Jersey regarding possible representation of New Jersey), 12 (same), and portions of four others, *see supra* note 23 (discussing portions of Priv. Log 4, 6, 89, and 104).

FTC v. Grolier Inc., 462 U.S. 19, 27 (1983); *see also* Fed. R. Civ. P. 26(b)(3) (allowing discovery of work product upon showing "substantial need" and "that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means").

Here, there is a substantial need for the materials withheld by BP. A critical issue in this case is whether the Court's original jurisdiction has been properly invoked by New Jersey. The communications between BP and New Jersey may constitute the only reliable source of evidence as to whether BP is the real party in interest here and is directing litigation that New Jersey brought because of BP's urging and support. Those communications are also essential to determining whether BP and New Jersey purposefully withheld from the Court information about future BP litigation, and whether BP refrained from filing such litigation, to create the appearance that no alternative forum existed in which claims about the 1905 Compact could be litigated. *See* DE Opp. to NJ Mot. to Strike 7-17.

BP claims (at 10-13) that the communications are not relevant to identifying the real party in interest, asserting that New Jersey's reasons for filing suit, and BP's role both in that decision and in the conduct of the litigation, are beside the point. That issue has been fully briefed in the context of New Jersey's motion to strike. Although BP cites cases holding in certain contexts that a party's motive for filing suit is not pertinent, it ignores the highly analogous context of the prohibition on collusive diversity jurisdiction, under which the Court *does* examine the motives of persons that may have acted in concert improperly to create diversity jurisdiction. *See* 28 U.S.C. § 1359 ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."); *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 828 (1969) (dismissing for lack of jurisdiction because the plaintiff "admits that the

assignment [of the claim to the plaintiff] was in substantial part motivated by a desire by [the assignor's] counsel to make diversity jurisdiction available") (internal quotation marks omitted); DE Opp. to NJ Mot. to Strike 17 & n.19 (discussing this principle).[28]

Thus, in *Arkansas v. Texas*, 346 U.S. 368 (1953), the Court explained that in an original action it "determine[s] whether in substance the claim is that of the State, whether the State is indeed the real party in interest," and that it "of course" does so by "look[ing] *behind and beyond* the legal form in which the claim of the State is pressed." *Id.* at 371 (emphasis added). Therefore, subject-matter jurisdiction must be assessed based on the circumstances surrounding New Jersey's invocation of the Court's original jurisdiction. If it was to further BP's private, commercial interests and was brought only because, for example, BP agreed to shoulder the legal workload or to hire and pay for New Jersey's preferred outside counsel, it is highly likely that the Court's original jurisdiction was improperly invoked. Delaware should be given the opportunity to make its jurisdictional arguments based on a complete record. *See Wyoming v. Oklahoma*, 502 U.S. 437, 446-50 (1992) (accepting Special Master's holding, "arrived at after consideration of all the facts submitted to him" through discovery, that standing and jurisdiction were proper).

Moreover, in deciding whether to exercise its original jurisdiction, the Court looks to "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); *see also California v. Texas*, 457 U.S. 164, 168 (1982) (per curiam) (same). Accordingly, the fact that BP told the Court in its Segal Declaration that it was not and never had been party to a suit in which the 1905 Compact issues had been raised and would await the outcome of this litigation — yet now claims that it was nevertheless anticipating litigation on that very issue — raises serious questions about BP's and New Jersey's actions in

[28] New Jersey's reply brief supporting its motion to strike likewise ignores this principle.

preparing New Jersey's filing in such a way as to make it appear that there was no viable alternative forum in which the compact issues could be raised and subsequently reviewed by this Court on a petition for a writ of certiorari. *See, e.g.*, *Illinois v. Michigan*, 409 U.S. at 37 ("original jurisdiction . . . is not an alternative to the redress of grievances which could have been sought in the normal appellate process"); DE Opp. 25-35; DE Opp. to NJ Mot. to Strike 7-17.

Accordingly, even if the work product privilege is deemed to apply, the Special Master should require those materials to be produced on the basis of "substantial need" under Rule 26(b)(3). Delaware recognizes that these materials might reveal the mental impressions of counsel and therefore be fairly described as opinion work product, which courts have held requires a higher showing than for fact work product, such as where "mental impressions are at issue in a case and the need for the material is compelling." *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (requiring production where motive of insurance company settlement was at issue); *Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 173 F.R.D. 7, 17 (D. Mass. 1997) (requiring production, explaining that "opinion work product is subject to discovery where the mental impressions of counsel are directly at issue"). That standard is satisfied here. The materials concern the pivotal issue of the Court's original jurisdiction and provide evidence supporting Delaware's submission that BP is the real party in interest underlying New Jersey's suit.

To be clear, in requesting full and fair discovery on its jurisdictional claims, Delaware is not seeking to gain access to counsel's mental impressions for the purpose of contradicting any arguments that New Jersey or BP has made or will make as to the merits of this case. *Cf.* NJ Letter Br. 6-7. In that regard, Delaware would stipulate that it will use those materials only to litigate its jurisdictional claims and not to support its arguments on the merits of the dispute. *Cf.*

21A Wright § 5067, at 358 (2d ed. 2005) (under the Federal Rules of Evidence, "if the evidence is admitted to impeach, the judge cannot use it in her findings of fact as substantive evidence").[29]

III. THE "COMMON INTEREST" DOCTRINE DOES NOT JUSTIFY WITHHOLDING THE DOCUMENTS DISCLOSED BY BP AND NEW JERSEY TO EACH OTHER

Even if the materials identified above were, when created, protected from discovery by the work product doctrine or the attorney-client privilege, that protection has been destroyed by disclosure of the material. "[W]aiver occurs when a party claiming the privilege has *voluntarily* disclosed confidential information on a given subject matter to a party not covered by the privilege." *Hanson*, 372 F.3d at 294. Because BP voluntarily disclosed each of the 264 logged materials to New Jersey (or vice versa), any work product protection or attorney-client privilege that might have attached is waived, and BP must now produce those materials.

A. BP And New Jersey Lack A Common Interest Sufficient To Preclude Waiver

In determining what legal standard should apply to BP's claim, this Court's decision is readily assisted by settled principles of federal common law.[30] It is well settled that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). That principle applies with full force to the common interest doctrine: "Because it excludes documents and communications from discovery, the common interest doctrine should be

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[29] At a minimum, the Court should review those logged documents *in camera* to determine whether they bear on the Court's jurisdiction and should therefore be produced to Delaware (whether in full or with appropriate redactions).

[30] Conversely, secondary sources such as the *Restatement (Third) of Law Governing Lawyers* (2000) ("*Restatement*") offer this Court little guidance. As courts have recognized in the privilege context, the claims of legal commentators are not substitutes for valid legal precedents, such as *Duplan* and its progeny. *Cf. In re Grand Jury Subpoena Duces Tecum*, 112 F.3d at 924 (rejecting the *Restatement*'s assertion that anticipation of congressional hearings, rather than anticipation of actual litigation, can suffice to create work product protection).

construed narrowly and extended cautiously." *Ferko v. National Ass'n for Stock Car Auto Racing, Inc.*, 219 F.R.D. 403, 406 (E.D. Tex. 2003).[31]

1. BP Cannot Satisfy the Identical Interests Standard in *Duplan*

Under a longstanding line of cases beginning with *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974), and continuing to the present day, courts applying the common interest doctrine have required parties to demonstrate "an identical legal interest with respect to the subject matter of a communication" in order to prevent privilege waiver through voluntary disclosure. *Id.* at 1172. Under those cases, the "key consideration" in applying the common interest doctrine "is that the nature of the interest be *identical*, not similar, and be *legal*, not solely commercial." *Id.* (emphases added). Numerous courts have employed this rule when resolving common interest disputes. *See, e.g.*, *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 705 (10th Cir. 1998) (citing *Duplan*).[32] Where parties have voluntarily disclosed

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[31] *See also Denney v. Jenkens & Gilchrist*, 362 F. Supp. 2d 407, 415 (S.D.N.Y. 2004) ("Like all privileges, the common interest rule is narrowly construed."); *Gulf Islands Leasing, Inc. v. Bombadier Capital, Inc.*, 215 F.R.D. 466, 471 (S.D.N.Y. 2003) (same); *Cigna Ins. Co. v. Cooper Tires & Rubber, Inc.*, No. 3:99CV7397, 2001 WL 640703, at *2 (N.D. Ohio May 24, 2001) ("[T]he 'common interest' extension of the privilege should be construed narrowly, rather than expansively."); *In re FTC*, No. M18-304 (RJW), 2001 WL 396522, at *5 (S.D.N.Y. Apr. 19, 2001) (rejecting claim that party had attorney-client relationship with its clients' counsel, because party had not retained that counsel, and "[t]he common interest rule, which must be construed narrowly, does not sanction such a result"); *Boston Auction Co. v. Western Farm Credit Bank*, 925 F. Supp. 1478, 1483 (D. Haw. 1996) ("[T]his court must construe the [joint defense] privilege narrowly, to the purpose for which it exists.").

[32] *See also Denney*, 362 F. Supp. 2d at 415 (requiring proof of an "identical legal strategy" to apply the common interest doctrine) (internal quotation marks omitted); *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004) (refusing to apply common interest doctrine where "SRU has not provided proof sufficient to establish that, at the time of their negotiations, BD and SRU shared identical legal interests in the subject opinions of counsel"); *Bank of America, N.A. v. Terra Nova Ins. Co.*, 211 F. Supp. 2d 493, 497 (S.D.N.Y. 2002) ("Because the interests of the parties were not identical, the common interest doctrine does not apply."); *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437-38 (E.D. Pa. 2000) (where AT&T sought information shared between inventor and MCI during negotiations, observing that "[t]o take advantage of the common interest doctrine the plaintiffs must still satisfy their burden of proving

privileged material to others with less than identical legal interests, privileges have been deemed waived. *See, e.g.*, *Research Inst. for Medicine & Chemistry, Inc. v. Wisconsin Alumni Research Found.*, 114 F.R.D. 672, 678 (W.D. Wis. 1987) (in patent dispute, recognizing that a finding of patent invalidity would merely relieve the non-exclusive licensee of its need to pay royalties or worry about claims of patent infringement, such that no common interest existed on the validity of the patent; "[w]hile a licensee may well have had an interest, for business reasons and convenience, in the continued validity of [the patent] . . . that interest was quite different from [the patentee's interest]," which was "the monopoly afforded by the patent," such that "[t]he risk of loss, then, (or the prospect of gain) presented by a challenge to the validity of [the patent] . . . was substantially disparate in terms of legal effect," defeating a claim of common interest).

The approach taken by federal courts in both New Jersey and Delaware also provides guidance for this Court's selection of a legal standard. *Cf.* BP Mot. to Quash 18-19. Notably, *Duplan*'s rule continues to be applied in both New Jersey and Delaware. In *Pittston Co. v. Allianz Insurance Co.*, 143 F.R.D. 66 (D.N.J. 1992), the court (citing *Duplan*) refused to apply the common interest doctrine to a dispute between an insured and an insurer, noting that "[t]he interests of the parties to this action . . . were not 'identical,' " because, "[e]ven assuming a common interest in limiting the amount of damage, the parties do not have a common interest in characterizing how that damage occurred, what type of damage occurred, or how the plaintiff responded." *Id.* at 70. Similarly, in *Remington Arms Co. v. Liberty Mutual Insurance Co.*, 142 F.R.D. 408 (D. Del. 1992), the court refused to apply the common interest doctrine to insured-

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first that the material is privileged and second that the parties had an identical legal, and not solely commercial, interest," and refusing to apply the common interest doctrine because "the plaintiffs failed to prove that the parties to the negotiations shared an identity of interests such to invoke the common interest doctrine"); *Power Mosfet Techs. v. Siemens AG*, 206 F.R.D. 422, 424-25 (E.D. Tex. 2000) (applying common interest doctrine requires "an identical, not similar, legal interest, and not merely a commercial interest").

insurer disclosures made in the absence of a common legal interest. The court emphasized that the doctrine should not apply in the face of "uncertainty as to the scope of any identity of interest" between the insured and the insurer, even assuming "the parties shared an interest in lowering the amount of damage in the underlying action" — that is, shared an interest in seeing a third party lose its case for damages — because the insurer and the insured "did not then and do not now share an interest in characterizing how that damage occurred, what type of damage has occurred, or how [the insured] responded to the damage," and "[t]hese and other issues are interwoven into those issues in which the parties' interests may have overlapped." *Id.* at 418 (internal quotation marks omitted). *Accord Corning*, 223 F.R.D. at 190 (quoting *Duplan* to demonstrate that, "for a communication to be protected, the interests must be 'identical, not similar, and be legal, not solely commercial,'" and using that standard to deny application of the common interest doctrine to communications made "not in an effort to formulate a joint defense but rather to persuade [one party] to invest in [the other party]").

2. Even Under a Less Rigorous Common Interest Standard, BP Should Not Be Permitted To Shield Its Documents from Disclosure

BP urges a departure from *Duplan*, but its reliance on decisions that have articulated a less demanding version of the common interest doctrine is unpersuasive. *See, e.g.*, *In re Regents of Univ. of California*, 101 F.3d 1386, 1390 (Fed. Cir. 1996) (finding non-waiver where option agreement gave corporation right to exclusive license for researcher's patents, such that licensee and researcher had "substantially identical" interests in legal advice on patent prosecution); *Travelers Cas. & Sur. Co. v. Excess Ins. Co.*, 197 F.R.D. 601, 607 (S.D. Ohio 2000) (applying common interest doctrine to statements made at a conference for European reinsurance companies facing similar claims in American asbestos-related litigation, as these were exchanges

"between 'friendly litigants' with similar interests"); *Restatement* §§ 76(1), 91. BP urges this Court to adopt that standard, which it claims to meet. *See* BP Mot. to Quash 15-17, 24-25.

BP also cites (at 23-24) *Dexia Credit Local v. Rogan*, 231 F.R.D. 287 (N.D. Ill. 2005), and *North River Insurance Co. v. Columbia Casualty Co.*, No. 90 Civ. 2518 (MJL), 1995 WL 5792 (S.D.N.Y. Jan. 5, 1995), to support its attack on *Duplan* and its progeny. But, in *Dexia*, the court in fact determined that the parties had identical legal interests. *See* 231 F.R.D. at 294 ("The fact that EMC and the Management Companies had different business reasons for relying on the advice does not undermine that they had the *identical interest* in the legal advice itself. And, it is the common legal interest, not business interest, that is central to application of the common interest doctrine.") (emphasis added). Similarly, in *North River*, the court determined that the joint defense privilege did not in fact apply, because, "[w]hile [the parties'] commercial interests coincided to some extent, their legal interests *sometimes diverged*," as they stood as reinsurer and ceding insurer, and hence had different preferences for determining the size and nature of coverage and liability. 1995 WL 5792, at *5 (emphasis added). Thus, both *Dexia* and *North River* are entirely consistent with the *Duplan* line of cases.

Even if something less demanding than *Duplan* and its progeny govern this dispute — and the number of recent cases continuing to follow *Duplan* belie BP's claim (at 22) that *Duplan* is not the "modern view" — BP has not demonstrated that its interests in common with New Jersey satisfy even a lessened standard. BP's interest in this case is extremely narrow: it is interested only in Delaware losing the ability to block BP's construction of its proposed LNG facility.[33] BP has not identified any interest in *why* Delaware loses this case or *whether* New

[33] BP Response to Rule 45 Subpoenas at 6 (articulating BP's interest as follows: "Should New Jersey prevail, the Crown Landing Facility will not require the Delaware permits that have been withheld by the State of Delaware").

Jersey obtains all the relief sought in its initial pleading. New Jersey, in contrast, apparently cares a great deal about those other issues; indeed, New Jersey has represented that there is only "*some* commonality between the[ ] interests" of BP and New Jersey. NJ Mot. to Strike 19 (emphasis added). New Jersey's prayer for relief requested declaratory and injunctive relief that would prevent Delaware from regulating "*any* improvement appurtenant to the New Jersey shore of the Delaware River within the Twelve-Mile Circle," whether by requiring permits in the future or enforcing previously issued permits. NJ Pet. 17 (Prayer for Relief) (emphasis added). New Jersey requested a declaration that New Jersey has "jurisdiction to regulate [those] improvements . . . free of regulation by Delaware." *Id.* at 16-17. BP can not credibly claim any interest in New Jersey's expansive claims for relief, which go well beyond BP's narrow commercial interests. Indeed, BP and New Jersey may find themselves in conflict if the 1905 Compact were construed to confer on New Jersey jurisdiction to approve *some* riparian improvements over Delaware's objection, but *not* a project such as BP's that has significant effects on Delaware's regulatory interests beyond those encompassed within the meaning of "riparian jurisdiction." Such a holding conceivably could satisfy much of New Jersey's apparent demands while still conferring on Delaware significant regulatory authority over projects such as BP's. *See* DE Opp. 56-71.

In addition, New Jersey has made clear that, even if it prevails on the question whether Delaware can block BP from building its LNG facility, the declaratory and injunctive relief that New Jersey seeks would permit it to block that same facility. As New Jersey explains, "even if New Jersey prevails in this action, the result will not be the automatic approval of BP's application." NJ Mot. to Strike 20 (citing New Jersey's Rules on Coastal Zone Management, N.J. Admin. Code tit. 7, § 7E-7.4(s)). Not only does New Jersey's failure to approve — or even

indicate that it will approve — BP's proposed facility mean that this dispute is not ripe, *see* DE Opp. 28, but BP will have every incentive to oppose and seek to invalidate New Jersey's regulatory authority, to the extent that it stands in the way of that facility's construction.[34] Because BP thus lacks an affirmative legal interest in validating New Jersey's legal rights, BP's voluntary disclosures of privileged materials are not protected by the common interest doctrine. *See Research Inst.*, 114 F.R.D. at 678 (where party supports another's litigation position "for business reasons and convenience," but in truth has no legal interest in resolution of the dispute, common interest doctrine does not apply).

In truth, the only "common" interest that New Jersey and BP have in the outcome of No. 134, Original, is in seeing Delaware lose on the question of its right to regulate BP's LNG facility. But a general interest in seeing one party lose a lawsuit is not enough to invoke the protection of the common interest doctrine, even under BP's preferred standard. Were such a general interest sufficient, all joint defendants would enjoy broad latitude to disclose privileged material to each other. All those who have a preference that one side of a lawsuit lose could be given privileged material by the other side without fear of waiver. Federal common law does not recognize such a broad exception, which would functionally swallow the privilege waiver doctrine. Tellingly, BP does not cite any case in which such a limited overlap of interests has been found sufficient to justify application of the common interest doctrine. On the contrary, the cases hold that an "asserted interest [that] could be construed to encompass a desire for [one party] to reach a favorable outcome in the litigation with [the other]" is "insufficient to invoke

[34] Significantly, BP has not foresworn petitioning the Secretary of Commerce to override a determination by New Jersey that the LNG facility is inconsistent with New Jersey's coastal zone laws. *See* 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. §§ 930.121-930.122. While that option remains on the table, it rings false for BP to claim that its interests align with New Jersey's own in validating New Jersey's authority to regulate projects such as BP's proposed LNG facility under the 1905 Compact.

the common interest rule." *Gulf Islands Leasing*, 215 F.R.D. at 473; *see also Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999) ("[S]haring a desire to succeed in an action does not create a 'common interest'."), *modified on reargument on other grounds*, 187 F.R.D. 148 (S.D.N.Y. 1999).

In light of the disparate commercial and legal interests of BP and New Jersey, the articulation of the applicable legal standard is of little import. Under either *Duplan* and its progeny or the assortment of sources cited in BP's motion, BP and New Jersey have insufficiently similar legal interests to warrant application of the common interest doctrine.

B. Disclosures Made Prior To The Formation Of Any Common Interest Must Be Produced

Under any formulation, proper application of the common interest doctrine turns on the identity of interests *at the time of the disclosure*; subsequent alignment in position is irrelevant. *See, e.g.*, *In re Grand Jury Subpoena Under Seal*, 415 F.3d 333, 340-41 (4th Cir. 2005) (disclosure before common interest has arisen waives protections), *cert. denied*, 126 S. Ct. 1114 (2006); *United States v. Newell*, 315 F.3d 510, 525-26 (5th Cir. 2002) (finding waiver where there was "no common legal interest … at the time [of disclosure]"); *Holland v. Island Creek Corp.*, 885 F. Supp. 4, 6 (D.D.C. 1995) ("Whether the parties shared a 'common interest' in the anticipated litigation must be evaluated as of the time that the confidential information is disclosed.").

BP's privilege log reveals that, as early as February 16, 2005, and as late as June 23, 2005, BP engaged in an effort to lobby New Jersey officials and thereby align New Jersey's interests with BP's own. BP's lobbyist contacted New Jersey regulatory officials to discuss New Jersey initiating an original action before this Court. *See* Priv. Log 4-6. BP's lobbyist then engaged in discussions with a number of New Jersey legal and regulatory officials regarding the

possibility of a lawsuit involving New Jersey. *See* Priv. Log 7-10. And, following the New Jersey Governor's decision to file this suit, BP's lobbyist contacted another branch of New Jersey government to ascertain the opinion of the legislature on these matters and to secure its assistance. *See* Priv. Log 50-53, 104-105.

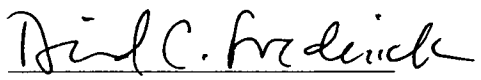
These log entries confirm that BP was attempting to convince New Jersey to bring this suit and thereby vindicate BP's commercial interests. As a matter of logic, that lobbying effort precludes a finding that BP and New Jersey had a common interest while that lobbying was occurring. BP's need to employ a lobbyist to alter New Jersey's preferences is hardly surprising; New Jersey had remained silent on this issue for more than 70 years since the States settled their dispute before this Court in 1934, suggesting that New Jersey decided long ago to forswear litigation over any nascent claims regarding riparian rights under the 1905 Compact. Indeed, in 1996, New Jersey itself applied to Delaware for a permit to build a pier extending from Fort Mott State Park into the twelve-mile circle. In 2005, when BP was attempting to persuade New Jersey to reverse that state policy and bring this litigation, a common interest could not have existed between BP and New Jersey.

These initial "lobbying" communications were necessarily made prior to the formation of common legal interests among the relevant participants. At a minimum, therefore, those communications must be produced.

CONCLUSION

For the foregoing reasons, Delaware respectfully requests that this Court compel BP to produce the documents identified herein.

Respectfully submitted,



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June 5, 2006

In the
SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY, ***Plaintiff,*** **v.** **STATE OF DELAWARE,** ***Defendant.***	**No. 134, Original** **Before the Special Master** **The Hon. Ralph J. Lancaster**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of May 2006, counsel for the State of Delaware caused true and correct copies of the OPPOSITION OF STATE OF DELAWARE TO BP'S MOTION TO QUASH, IN PART, SUBPOENAS SERVED BY THE STATE OF DELAWARE, and attachments thereto, to be served upon counsel for the State of New Jersey in the manner indicated below:

BY ELECTRONIC MAIL AND THREE COPIES BY FIRST CLASS MAIL

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David C. Frederick
Special Counsel to Defendant
State of Delaware

ATTACHMENT 1

No. 134, Original

In the
Supreme Court of the United States

STATE OF NEW JERSEY,
Plaintiff,
v.
STATE OF DELAWARE,
Defendant.

TO: Crown Landing LLC c/o its Registered Agent
The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, DE 19801

☐ YOU ARE COMMANDED to appear in the United States Supreme Court, Special Master Ralph I. Lancaster, Jr., presiding, at the place, date, and time as specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

All documents listed in Exhibit A attached hereto.

PLACE	DATE AND TIME
Connolly Bove Lodge & Hutz LLP The Nemours Building 1007 North Orange Street, 9th Floor P.O. Box 2207 Wilmington, DE 19899	April 10, 2006 @ 10:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
/s/ Max B. Walton (Attorney for Defendant)	March 6, 2006

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Max B. Walton, Esq., Connolly Bove Lodge & Hutz LLP, 1007 North Orange Street, 9th Floor, P.O. Box 2207, Wilmington, DE 19899 - Tel: (302) 658-9141

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D, as adopted by the Case Management Plan of Special Master Ralph I. Lancaster, dated February 8, 2006)

PROOF OF SERVICE

DATE PLACE

SERVED

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED BY (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D, quoted below, applies to this action pursuant to the Case Management Plan of Special Master Ralph I. Lancaster, dated February 8, 2006. Section 5.2.11 of the Case Management Plan states in part that "Rule 45 will apply with the exception that the subpoena power of the Special Master will not be limited geographically by the 100-mile rule." A copy of the Case Management Plan is attached hereto as Exhibit B.

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance; or
(ii) (omitted, see case management order at page 5)
(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
(iii) (omitted, see case management order at page 5)

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT A

EXHIBIT A

DOCUMENT REQUESTS

Terms used herein are defined in a separate section titled "Definitions" below. Please take particular note of the definitions provided for "BP" and "New Jersey."

1. All Documents referring, reflecting, or relating to the Declaration of Lauren B. Segal, Vice President of Crown Landing LLC, dated June 27, 2005 ("Segal Declaration"), which New Jersey attached to its initial filing of July 28, 2005 in *New Jersey v. Delaware*, including but not limited to drafts of the declaration and memoranda, correspondence, and communications, whether internal to BP, between BP and a Third Party, or between BP and New Jersey, and whether they occurred before or after *New Jersey v. Delaware* was filed.

2. All Documents referring, reflecting, or relating to *New Jersey v. Delaware*, the 1905 Compact, the proposed Crown Landing Facility, any other proposed BP LNG Facility to be located in any way in Delaware Territory, including but not limited to any and all legal briefs, drafts, memoranda, other declarations, affidavits, correspondence, and communications whether internal to BP, between BP and a Third Party, or between BP and New Jersey, and whether they occurred before or after *New Jersey v. Delaware* was filed.

3. All Documents referring, reflecting, or relating to the nature and amount of dredging of submerged lands of the Delaware River, all facilities used to transfer liquefied natural gas from ship to shore, and any activity that would occur on, in, over, or under Delaware Territory if the proposed Crown Landing Facility were permitted and/or constructed, including but not limited to the assertions made in paragraph 4 of the Segal Declaration.

4. All Documents referring, reflecting, or relating to the following statement in paragraph 20 of the Segal Declaration, including but not limited to any communications and

correspondence with New Jersey preceding the events described herein: "Officials of the State of New Jersey have recently informed Crown Landing that New Jersey objects to the efforts of the State of Delaware to apply its permitting requirements to th[e] [Crown Landing] Project."

5. All Documents referring, reflecting, or relating to the following statement in paragraph 21 of the Segal Declaration, including but not limited to any communications and correspondence with New Jersey concerning or informing Crown Landing's "understanding" of the "action" that "New Jersey would undertake": "Crown Landing further advised FERC that it was its understanding that New Jersey would undertake whatever appropriate action is necessary to confirm that Delaware lacks the authority to require any Delaware permits for the [Crown Landing] Project."

6. All Documents referring, reflecting, or relating to any discussions or communications to or from New Jersey or any Third Party relating to New Jersey's regulatory authority and/or jurisdiction over the proposed Crown Landing Facility.

7. All Documents referring, reflecting, or relating to any discussions or communications, including but not limited to those to or from New Jersey or any Third Party, relating to the proposed Crown Landing Facility, any other proposed BP LNG Facility to be located in any way in Delaware Territory, Delaware's regulatory authority over such projects (including via Delaware's Coastal Zone Act), and/or New Jersey's regulatory authority over such projects.

8. All Documents referring, reflecting, or relating to any discussions or communications, including but not limited to those to or from New Jersey or any Third Party, relating to *New Jersey v. Delaware*, *Virginia v. Maryland*, or the 1905 Compact, including but not limited to Documents referring, reflecting, or relating to the following statement in paragraph

23 of the Segal Declaration, "Crown Landing is not, and has never been, a party to any proceeding in which it has attempted to obtain a ruling concerning New Jersey's rights under the Compact of 1905."

9. All Documents referring, reflecting, or relating to all historical or archival research, legal research, or expert research performed by BP, its attorneys, or agents pertaining to *New Jersey v. Delaware*, the 1905 Compact, and Delaware's or New Jersey's jurisdiction over the proposed Crown Landing Facility, including but not limited to any such discussions, memoranda, or communications between BP and New Jersey.

10. All Documents referring, reflecting, or relating to any discussions or communications with New Jersey or any Third Party regarding the public trust doctrine, riparian rights, the riparian privilege, or riparian jurisdiction.

11. All Documents referring, reflecting, or relating to any agreements or contracts (formal or informal) with New Jersey relating to the proposed Crown Landing Facility or *New Jersey v. Delaware*, and any actual, promised, or proposed payments associated with either.

DEFINITIONS

As used herein, the following terms shall have the meanings set forth below unless specifically indicated:

A. "Document" means any kind of written, recorded or graphic matter, whether produced, reproduced or stored on paper, cards, film, audio or video tapes, electronic facsimile, electronic mail, computer storage device, or any other media, or any kind or description, whether sent or received or neither, including, without limitation: originals, copies (with or without notes or changes therein) and drafts including, without limitation: papers, books, letters, photographs, objects, tangible things, correspondence, telegrams, cables, telex messages, memoranda, notes, notations, work papers, transcripts, minutes, reports and recordings of telephone or other conversations, or of interviews, conferences, or other meetings, affidavits, declarations, statements, summaries, opinions, reports, studies, analyses, evaluations, contracts, agreements, journals, newspaper accounts, statistical records, desk calendars, appointment books, diaries, lists, tabulations, summaries, sound recordings, computer printouts, data processing input and output, microfilms, e-mails, all other records kept by electronic, photographic or mechanical means, and things similar to the foregoing however denominated by You, in the possession, custody or control of You or any officer, employee, consultant, agent or counsel of or for You.

In the event that any document called for by this request has been destroyed or discarded, that document is to be identified as follows:

(i) Each addressor and addressee;

(ii) Each indicated or blind copy;

(iii) The document's date, subject matter, number of pages and attachments or appendices;

(iv) All persons to whom the document was distributed, shown or explained;

(v) Its date of destruction or discard, manner of destruction or discard, and reason for destruction or discard; and

(vi) The person who authorized such destruction or discard.

B. "You" or "your" shall refer to the person, partnership or entity producing the documents requested, and all agents and representatives and all other persons acting on behalf of or who have purported to act on behalf of You or any associated persons, partnerships or entities.

C. Words in the singular include the plural, words in the plural include the singular.

D. Words in the past tense include the present tense, words in the present tense include the past tense.

E. "And" and "or" are both conjunctive and disjunctive.

F. "BP" shall mean British Petroleum p.l.c., BP Corporation North America, Inc., BP Company North America Inc., BP America Production Company, BP America, Inc., BP Energy Company, Crown Landing LLC, and any of their current or former ("current or former" modifies all of the terms in the following list) affiliated or associated entities, subsidiaries, parent corporations, parent entities, owners, representatives, shareholders, directors, officers, employees, attorneys, members, managers, agents, predecessors in interest, successors and assigns, and any entity, person or partnership acting on their behalf.

G. "Crown Landing Facility" shall mean that certain proposed liquefied natural gas import terminal and re-gasification facility, proposed to be located in Logan Township, New Jersey, with a pier, pipeline and associated structures to be located on Delaware's submerged lands within Delaware's coastal zone in the Delaware River. (Federal Energy Regulatory Commission Dkt. No. CP04-411-000).

H. "Delaware's Coastal Zone Act" shall mean Del. Code Ann. tit. 7, §§ 7001 *et seq.* and regulations adopted pursuant thereto, and also shall include Delaware's Coastal Zone

Management Plan (as amended) adopted pursuant to 16 U.S.C. § 1451 *et seq.* and regulations adopted pursuant thereto.

I. "Delaware Territory" shall mean the sovereign lands of Delaware, including but not limited to the submerged lands beneath the Delaware River that are within the Twelve-Mile Circle and that the Supreme Court confirmed in *New Jersey v. Delaware*, 295 U.S. 694 (1935), are part of Delaware's sovereign lands.

J. "LNG Facility" shall mean a liquefied natural gas import terminal and re-gasification facility.

K. "New Jersey" shall mean the State of New Jersey and any of its current or former ("current or former" modifies all of the following terms) Governors, Attorneys General, elected officials (including those elected to state or federal legislatures), departments, subdivisions, political subdivisions, agencies, boards, offices, officials, agents, or attorneys; any employee, official, agent or elected representative of any County, municipality, or township in New Jersey; and any person, entity, or partnership acting on behalf of the State of New Jersey in any official or any unofficial capacity.

L. "New Jersey's Coastal Zone Act" shall mean all laws of the State of New Jersey that govern or regulate New Jersey's coastal zone in the Delaware River and any regulations adopted pursuant thereto, and shall also include New Jersey's Coastal Zone Management Plan (as amended) adopted pursuant to 16 U.S.C. § 1451 *et seq.* and all regulations adopted pursuant thereto.

M. "*New Jersey v. Delaware*" shall mean that certain original jurisdiction action filed by the State of New Jersey against the State of Delaware in the United States Supreme Court on or about July 28, 2005, originally brought as a Motion to Reopen and for a

Supplemental Decree of No. 11, Original, and later designated as *New Jersey v. Delaware*, No. 134, Original.

N. "Third Party" shall mean any person, entity, state, agency, government, political subdivision, or partnership other than BP.

O. "1905 Compact" shall mean that certain Compact between the states of New Jersey and Delaware ratified by the United States Congress on or about January 24, 1907.

EXHIBIT B

PIERCE ATWOOD
LLP
ATTORNEYS AT LAW

Ralph I. Lancaster, Jr.

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207-791-1350 fax
rlancaster@pierceatwood.com
pierceatwood.com

February 8, 2006

Re: New Jersey v. Delaware
No. 134, Original

Dear Counsel:

Enclosed please find Case Management Order No. 1, with the Case Management Plan attached.

Sincerely,

Ralph I. Lancaster, Jr.

RIL/eu
Enclosures

No. 134, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff

v.

STATE OF DELAWARE,

Defendant

OFFICE OF THE SPECIAL MASTER

CASE MANAGEMENT ORDER NO. 1

February 8, 2006

CASE MANAGEMENT ORDER NO. 1

For purposes of the proceedings before the Special Master, IT IS HEREBY ORDERED THAT:

1. The Case Management Plan ("CMP") attached hereto as Appendix 1, is hereby adopted to govern these proceedings.

2. On or before February 13, 2006, the State of New Jersey shall file a list of the issues to be decided by the Special Master. The State of Delaware shall file its list of issues to be decided by the Special Master within seven (7) days after receipt of the list of issues filed by the State of New Jersey and, in any event, no later than February 20, 2006.

3. On or before March 8, 2006, the State of New Jersey shall file any motion it chooses to make addressed to the relevance and/or admissibility of "the scope and status of British Petroleum's project" together with its supporting brief. The State of Delaware shall file its response to any such motion within thirty (30) days from the filing of said motion by the State of New Jersey and, in any event, no later than April 7, 2006. The State of New Jersey shall file any response to the aforesaid reply brief filed by the State of Delaware on or before April 14, 2006. Unless otherwise ordered by the Special Master for good cause shown, briefs shall not exceed twenty-five (25) pages in length.

4. Counsel for both States have informed the Special Master that they do not anticipate a need for an evidentiary trial. The State of Delaware has indicated that it may wish to present historical evidence in a format that would demonstrably supplement a paper record. Within five (5) days after completion of discovery, the State of Delaware shall file with the Special Master any application it wishes to make for such a demonstration, indicating the means by which the demonstration would be made and the

length of time such demonstration would take. The State of New Jersey shall have five (5) days thereafter within which to file a similar application or to object to the application by the State of Delaware.

5. Mark E. Porada, Esq. of Portland, Maine, an associate at Pierce Atwood LLP, the Special Master's law firm, is designated as the Special Master's Case Management Assistant and Law Clerk.

6. Any requests for modification or supplementation of this Case Management Order should be received by the Special Master on or before February 15, 2006.

Dated: February 8, 2006

Ralph I. Lancaster, Jr.
Special Master

Pierce Atwood LLP
One Monument Square
Portland, ME 04101
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Fax: (207) 791-1350
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No. 134, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff

v.

STATE OF DELAWARE,

Defendant

OFFICE OF THE SPECIAL MASTER

CASE MANAGEMENT PLAN

February 8, 2006

CASE MANAGEMENT PLAN

1. Case Management Orders And Application Of Case Management Plan

The Special Master will issue Case Management Orders ("CMOs") following conferences with counsel and at such other times as he deems appropriate. This Case Management Plan ("CMP"), together with all CMOs, will apply to and bind both parties, will control the course of the proceedings and may be modified only by order of the Special Master.

2. Filing Of Papers With The Special Master And Service

All documents shall be filed pursuant to the United States Supreme Court rules, except that all pleadings, papers and documents should be filed with the Special Master on 8 ½ x 11 inch paper, and except as otherwise modified by the Special Master. The parties shall make filings with the Special Master and service upon the other party by email (PDF), with duplicate copies of any materials transmitted by email also sent by first-class mail. In the event filings are too bulky, or otherwise unsuitable, for transmission by electronic means, they shall be sent by some means of overnight delivery. Four copies of each document sent in hard copy shall be filed with the Special Master. All pleadings, papers, and documents submitted to the Special Master shall be served on counsel for the other party in time for receipt on the same day that the Special Master receives them. Distribution need be made only to counsel and only in the quantities shown on the Distribution List attached hereto as Appendix A. All pleadings, papers and documents submitted to the Special Master must indicate, in the certificate of service or elsewhere, the means by which service or transmittal has been accomplished.

3. Filing Of Discovery Materials

3.1. General

In order to keep the record free of discovery material that has not become evidence, all interrogatories, requests for production of documents, requests for admissions, responses and replies shall not be filed with the Special Master unless a party offers a particular sworn discovery response into evidence, uses such response to support or oppose a dispositive motion or requires a ruling on a discovery dispute that the parties have been unable to resolve. In such event, only those portions pertinent to the purpose shall be filed. The parties shall file with the Special Master certificates of service for all discovery requests and discovery responses.

3.2. Depositions

Depositions shall not be filed with the Special Master until offered and admitted into evidence or used to support or oppose a dispositive motion or to resolve a discovery dispute that the parties have been unable to resolve.

4. Status Conferences

Unless otherwise directed by the Special Master, there will be monthly status conferences by telephone preceded in each instance by an emailed progress report according to the schedule set forth in Appendix B. During the discovery phase, the progress report shall update the status of each party's discovery efforts since the last update and describe any then unresolved disputes and list any further discovery anticipated during the current month. In addition, every progress report shall set forth the general status of the matter as it has evolved since the last progress report. The Special Master will schedule and hold additional status conferences as he deems necessary.

5. Discovery

5.1. General

Discovery will proceed on all issues pursuant to Fed.R.Civ. P. 26-37 and 45, except as otherwise modified herein or by other order of the Special Master. Discovery will commence and be completed in accordance with the schedule stated herein and in Appendix C. Further discovery will be allowed beyond the schedule stated herein and in Appendix C only upon motion to the Special Master. Both parties should understand that the Special Master does not intend to deviate from the established schedule except upon clear and convincing proof of good cause.

5.2. Federal Rules Of Civil Procedure 26-37, And 45

The Federal Rules of Civil Procedure applicable to discovery, Rules 26-37 and 45, shall govern the proceedings before the Special Master with the following exceptions:

5.2.1. Rule 26(a)(1)

The disclosures required in Rule 26(a)(1) will not apply. Instead, for each claim or defense, the parties will submit information as required by and in the form provided in the mandatory disclosures attached hereto as Appendices D-1 and D-2.

5.2.2. Rule 26(a)(2) - 26(a)(5)

These portions of Rule 26 will apply, except insofar as they are trial-specific and except that: (i) all time schedules and deadlines will be determined by the Special Master; and (ii) because the provisions of Rule 26(a)(4) requiring the filing of documents with

the court are inconsistent with this CMP, the filing of all documents with the Special Master shall be governed by this CMP.

5.2.3. Rule 26(b)(5)

Rule 26(b)(5) will not apply because the substance and timing of privilege logs is covered by section 8 of this CMP.

5.2.4. Rule 26(c)

Rule 26(c) will apply, except to the extent modified by section 10 of this CMP.

5.2.5. Rule 26(d)

Rule 26(d) will not apply. Rather, the timing and sequence of discovery will be determined by the Special Master. Unless the Special Master, for the convenience of the parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, will not operate to delay any other party's discovery. The parties are urged to apply adequate resources to initiate and complete discovery in an efficient and expeditious manner.

5.2.6. Rule 26(e)

Rule 26(e) will apply except to the extent modified by section 14 of this CMP.

5.2.7. Rule 26(f)

Rule 26(f) will not apply.

5.2.8. Rule 27

Rule 27 will not apply.

5.2.9. Rules 30(a)(2), 30(d)(2), Rule 31(a)(2), Rule 33 (a)

The limitations in Rules 30(a)(2), 30(d)(2), 31(a)(2) and 33(a) on the number and length of depositions and number of interrogatories will not apply. The number and length of depositions and interrogatories will be determined by the Special Master.

5.2.10. Rule 32(a)(3)(B)

The 100-mile rule contained in Rule 32(a)(3)(B) will not apply. *See* Rule 45, *infra*.

5.2.11. Rule 45

Rule 45 will apply with the exception that the subpoena power of the Special Master will not be limited geographically by the 100-mile rule. The parties shall cooperate with each other in securing the attendance of witnesses for depositions and shall each give reasonable notice to the other party if a witness is recalcitrant and will require a subpoena.

6. Substantive Discovery

This discovery plan provides that substantive discovery will proceed promptly and shall be concluded as expeditiously as reasonably practicable. Except as otherwise provided herein, to the extent possible, written discovery and the exchange of documents should be completed before deposition discovery begins. While there inevitably will be

some overlap, the goal of this discovery plan is to proceed in an organized fashion that will avoid unnecessary or repetitive discovery efforts on the part of the parties. Appendix C is a summary of the discovery dates and deadlines set forth herein.

6.1. Written Discovery

Written discovery shall consist of the following and, to the extent reasonably possible, follow the schedule set forth herein.

6.1.1. Initial Disclosures

The parties will complete the initial disclosures in the form applicable to them as set forth in Appendices D-1 and D-2. The deadline for response to the initial disclosures will be as follows:

6.1.1.a. New Jersey shall serve its initial disclosures no later than March 31, 2006;

6.1.1.b. Within one (1) month from the date of New Jersey's service of its initial disclosures and, in no event later than April 28, 2006, Delaware shall respond, to the extent necessary, to New Jersey's initial disclosures regarding defenses to the claims it is defending and shall serve its own initial disclosures.

6.2. Interrogatories

Upon completion of Delaware's responses to New Jersey's initial disclosures, and within one (1) month from the date of Delaware's response, in no event later than May 29, 2006, each party may serve one set of not more than fifty (50) interrogatories, including discrete subparts, on the other party. Without prior

written approval of the Special Master, no additional interrogatories may be served. Each party served with interrogatories shall have one (1) month from the date of service to respond, in no event later than June 30, 2006.

6.3. Requests for Production of Documents/Inspections to Parties

Within one (1) month from the date of service of Delaware's initial disclosures, in no event later than May 29, 2006, each party may serve requests for production of documents/inspections on the other party. A party upon which requests for production of documents/ inspections are served shall have one (1) month from the date of service within which to respond, in no event later than June 30, 2006.

6.4. Requests For Documents/Inspections To Non-Parties

Starting immediately after the date of this CMP, each party may serve on non-parties requests for production of documents/requests for inspection as provided in Fed. R. Civ. P. Rules 34(c) and 45. Any such requests shall be made not later than one (1) month after Delaware's initial disclosures, in no event later than May 29, 2006.

6.5. Requests to Admit

Within three (3) months of the date of service of Delaware's initial disclosures, in no event later than July 31, 2006, a party may serve requests for admission on the other party. Each party served with requests for admission shall have one (1) month from the date of service to respond, in no event later than August 30, 2006.

6.6. Deposition Discovery

Deposition discovery will take place in two phases according to the schedule set forth herein. Phase one will be fact/lay witness discovery. Phase two will be expert witness discovery. Phase one may begin immediately upon receipt of this CMP and shall

be completed not later than two (2) months after the conclusion of written discovery, in no event later than September 29, 2006. Phase two may also begin immediately and shall begin no later than upon completion of fact/lay witness depositions. Phase two shall be completed not later than one (1) month after the conclusion of fact/lay witness depositions, in no event later than October 30, 2006. Depositions will be conducted in accordance with the guidelines attached hereto as Appendix E.

6.6.1. Fact/Lay Witness Depositions

Phase one will consist of all fact/lay witness depositions, including the depositions of non-expert witnesses employed by the parties. The term fact/lay witnesses does not include those employees of either party whose training and experience provides them the expertise to testify as to experts.

6.6.2 Expert Witness Depositions

Phase two will consist of all expert witness depositions. Expert witnesses include all witnesses whose identity is required to be disclosed under Fed. R. Civ. P. Rule 26(a)(2). Expert witness depositions will be divided into fact experts and consultive experts:

6.6.2.a. Fact Experts

Fact experts are those who have personal knowledge of information and/or events and whose training and experience provide them the expertise to testify as experts. To the extent that fact experts will offer testimony as expert witnesses, an expert report must be filed containing the information required by Fed. R. Civ. P. 26(a)(2)(B).

6.6.2.b. Consultive Experts

Consultive experts are those experts who have been retained by the parties to testify as to matters and issues in this case. All expert reports required under Fed. R. Civ. P. 26(a)(2)(B) shall be provided as soon as available, and no later than twenty (20) days prior to the date of the expert's deposition.

7. Bates Numbering System

All documents produced by the parties shall bear a distinctive Bates number. Each party shall begin each Bates number with the two-letter abbreviation for the state as designated by the United States Postal Service. For example, a New Jersey Bates-numbered document will begin NJ 00001. All documents produced by non-parties shall state the identity of the non-party by proper name or recognized abbreviation before the Bates number. No party shall use any document that has not been Bates-numbered and produced, except for impeachment or for other good cause shown.

8. Privilege Logs

If a party withholds on the ground of privilege any written information (in hard copy or electronic form) it shall provide a privilege log to opposing counsel. These privilege logs shall set forth the following information: (a) author's name, place of employment and job title; (b) addressee's name, place of employment and job title; (c) recipient's name, place of employment and job title, if different than that of addressee; (d) general subject matter of document; (e) site of document; and (f) nature of privilege

claimed. Thereafter, any privilege log shall be supplemented to include any documents that are subsequently designated privileged by counsel.

9. Confidentiality

All documents, models or other tangible things containing a trade secret or other confidential information may be designated "Confidential," so long as such documents have not been disclosed by the producing party to anyone other than those persons employed or retained by it. Such documents or portions of documents shall be designated, after review by counsel for the producing party, by stamping "Confidential - S. Ct. 134" on each page. Any party may contest the designation of a document as "Confidential," or request that a document not otherwise covered by this CMP be considered confidential, by applying to the Special Master for a ruling. In either event, counsel shall first make a good faith effort to resolve the issue. The party requesting confidentiality shall have the burden of showing that such designation is appropriate. At a deposition, or within ten (10) business days after receipt of the transcript, a party may designate as confidential any appropriate information and such designation shall be served on all counsel. Confidentiality objections need not be made at a deposition and they shall not be a ground for a direction or refusal to answer, but counsel may indicate such designation at the time and the parties shall govern themselves accordingly. Depositions and transcripts will be considered to be confidential until expiration of the ten (10)-day period and thereafter as to any part or all so designated. Any individual not authorized by this CMP to be a recipient of confidential information may be excluded from a deposition while such information is being elicited.

Confidential documents or information subject to this CMP may not be disclosed to or used by anyone except those hereby authorized and by them only in the context of this case. Such individuals shall include counsel, the parties' specifically authorized employees, experts, and fact witnesses, together with such others as are approved by the Special Master. Each individual who is permitted to see such confidential documents, or given access to such confidential information, shall be bound to observe the provisions of this CMP with respect to all documents and information produced through these proceedings by signing a Non-Disclosure Agreement in a form agreed upon by the parties or approved by the Special Master if the parties cannot agree. The Non-Disclosure Agreement shall include an agreement to submit to the Special Master's jurisdiction for enforcement of this portion of the CMP and to return all such designated documents and information promptly at the end of the litigation.

10. Resolution Of Discovery Disputes And Motions To Quash And Seek Protective Orders

Before bringing a discovery dispute to the attention of the Special Master, the parties shall confer in an attempt to resolve the dispute. It shall be the responsibility of the moving party to initiate the conference immediately following the identification of the dispute. Failure promptly to initiate the conference, failure to respond promptly to the initiation or failure to cooperate in dispute resolution may result in an adverse ruling regardless of the merits. If the conferences do not resolve the dispute, the procedure for resolving the discovery dispute shall be as follows:

10.1. Written Discovery Disputes

10.1.1. Failure to timely respond to written discovery requests

In the event that timely responses to written interrogatories or document requests are not forthcoming, the proponent of the discovery should promptly file a motion to compel, which shall set forth the date the discovery was served and the due date for the responses, together with an averment of the default. No brief or copy of the interrogatories or document requests should accompany the motion. Upon receipt of such a motion, the Special Master, without waiting for a response, may enter an order directing the discovery to be provided by a certain date and including such sanctions as he deems appropriate.

10.1.2. Disputes Regarding Discovery Objections Or Adequacy Of Responses

In the event of a discovery dispute – in contrast to a default – arising by reason of the respondent's objections or concerning the adequacy of responses to interrogatories, document requests, requests to inspect, or requests to admit, the parties shall promptly and in good faith exert every reasonable effort to resolve their differences. Where objections are made, the objecting party shall provide all other discovery that such party does not consider to be

objectionable. As a last resort, any unresolved dispute shall be submitted to the Special Master as follows:

10.1.2.a. the parties shall first submit the dispute orally by telephone

10.1.2.b. if the dispute is not resolved telephonically, the parties shall make a written submission setting forth as to each individual discovery item in dispute the interrogatory, document request, request to inspect or request to admit, together with the answer or response, including any objection, as well as the parties' respective positions on a schedule set by the Special Master. These shall be set forth in sequence and, if practicable, on a single page and, in any event, separate and apart from any other discovery dispute. Case citations and other authority should be included.

11. Deposition Disputes

11.1 General Procedures

Except as is expressly provided in paragraph 11.2 below, discovery disputes that arise during a deposition shall be resolved by submission to the Special Master, according to the same procedure set forth in section 10 governing disputes in regard to the adequacy of responses to written discovery.

11.2. Disputes That Require Immediate Resolution

Where a dispute arises at a deposition and a party believes an immediate resolution is necessary to avoid the re-scheduling of the deposition or a significant disruption of the discovery schedule, the Special Master shall be telephoned.

11.2.1. If the Special Master is available and a telephone conference is held, the ruling of the Special Master shall be recorded in the deposition. The deposition shall proceed according to such ruling or direction. If the ruling or direction is that a witness must answer a question or questions despite an objection based upon claim of privilege or work product, the objecting party shall not be deemed to have withdrawn or waived its objection.

11.2.2. If the Special Master is not available by telephone during the deposition, the dispute shall be noted for the record and the deposition shall proceed with respect to all other issues. Thereafter, the dispute shall be presented to the Special Master as provided in section 10.

12. Disputes Not To End Deposition

Under no circumstances shall any party refuse to continue participating in a deposition because of the unavailability of the Special Master to resolve a dispute telephonically.

13. Motions To Quash Or For Protective Orders

The following procedures are to be employed in situations where subpoenaed persons or entities desire to move to quash a subpoena or seek a protective order from the demand of a subpoena.

13.1 Subpoenaed Parties

If the subpoenaed entity or person is a party or the employee of a party, then the entity or person must seek appropriate relief from the Special Master pursuant to the procedures for resolving written discovery disputes in section 10.

13.2. Subpoenaed Entities Or Persons Who Are Not Parties

When a party subpoenas a person or entity, the party issuing the subpoena should serve upon the subpoenaed person or entity, along with the subpoena, a copy of section 10 of this CMP. The subpoenaed person or entity may seek relief under this CMP, by submitting the dispute to the Special Master pursuant to the procedures for resolving written discovery disputes in section 10.

14. Supplementing Discovery

Recognizing that a party is under a duty seasonably to amend a prior response to an interrogatory, request for production or inspection, or request for admission if the party learns that the response is in some material respect incomplete or incorrect, the parties shall undertake a regularly scheduled supplementation of discovery responses three (3) months from the original due date of each discovery request and at each three (3) month period thereafter. It will satisfy the duty of supplementation if the party identifies only those specific responses that are supplemented. It is not necessary to restate each discovery response if there is no information to supplement, amend or

modify. Supplementation of written discovery will not be required to the extent the same information has been provided by subsequent deposition, but the fact of supplementation must be noted at the time of the deposition. Supplementation of Fed. R. Civ. P. Rule 26(a)(2), expert reports, is required to the extent that an expert has formed additional opinions or additional grounds to support previous opinions that have not been provided by way of expert report or deposition testimony. The duty to supplement expert reports includes opinions or grounds to support previous opinions formed after an expert has been deposed. Supplementation of deposition testimony of any witness other than an expert is not required. If there is no need to supplement, there is no need to file negative reports at the third month interval.

15. Dispositive Motions

Motions to dismiss or motions for summary judgment may be filed at any time up to and until one (1) month after the completion of deposition discovery, in no event later than November 30, 2006.

APPENDIX A
***New Jersey v. Delaware*, No. 134, Original**
Distribution List for Service of Documents and Email Filed with the Special Master
February 8, 2006

For State of New Jersey

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APPENDIX B
***New Jersey v. Delaware*, No. 134, Original**
Schedule of Progress Reports and Telephone Conferences
February 8, 2006

Progress Reports	**Telephone Conferences**
March 6, 2006	March 8, 2006
April 7, 2006	April 11, 2006
May 5, 2006	May 10, 2006

Each Progress Report should be sent by email so that it is received no later than 5:00 p.m. on the designated date.

Each Telephone Conference will be held at 10:00 a.m. Arrangements for dial-in will be made by the Special Master and the information about the arrangements will be furnished to counsel no later than one day prior to the scheduled conference.

At each conference, new dates will be set for the Progress Report to be furnished and for the Telephone Conference to be held during the month next after the last scheduled conference.

APPENDIX C
***New Jersey v. Delaware*, No. 134, Original**
Summary of Discovery Deadlines
February 8, 2006

Initial disclosures	New Jersey shall serve no later than March 31, 2006. Delaware shall serve no later than April 28, 2006.
Interrogatories	Interrogatories may be served commencing immediately upon Delaware's service of its initial disclosures and, in any event, no later than May 29, 2006.
Responses to interrogatories	Responses must be served within one (1) month from the date of service and, in any event, no later than June 30, 2006.
Document requests or requests for inspection to parties	Requests for production of documents/inspections may be served commencing immediately upon Delaware's service of its initial disclosures and, in any event, must be served no later than May 29, 2006.
Responses to document requests or request for inspection to parties	Responses must be served within one (1) month from the date of service and, in any event, no later than June 30, 2006.
Document requests to non-parties	Document requests to non-parties may be served commencing immediately upon receipt of this CMP and must be served no later than May 29, 2006.
Responses to document requests to non-parties	Responses must be served within one (1) month from the date of service and, in any event, no later than June 30, 2006.
Requests to admit	Requests to admit may be served commencing immediately upon Delaware's service of its initial disclosures and, in any event, must be served no later than July 31, 2006.
Responses to requests to admit	Responses must be served within one (1) month from the date of service and, in any event, no later than August 30, 2006.
Fact/lay witness depositions	Fact/lay witness depositions may begin commencing immediately upon receipt of this CMP and, in any event, must be completed no later than September 29, 2006.

Expert witness depositions	Expert witness depositions may begin commencing immediately upon receipt of this CMP and must, in any event, be completed no later than October 30, 2006.

The dates set forth above are the outside and final dates for the completion of the listed activity. Every effort should be made to complete each activity in advance of the prescribed deadline.

APPENDIX D-1
***New Jersey v. Delaware*, No. 134, Original**
New Jersey's Initial Disclosures
February 8, 2006

1. State precisely the nature of New Jersey's claims and a succinct statement of the legal issues in the case.

2. Describe in detail, separately as to each issue, all statutes, codes, regulations, legal principles, standards, and customs or usages and illustrative case law that New Jersey contends are applicable to this action.

3. Provide the name, address and telephone number of each individual state, local and federal government agency, organization, political subdivision or other entity likely to have discoverable information relevant to any disputed facts alleged by Delaware and currently known to you, identifying separately the subjects of the information as to each person and identity listed.

4. Provide a copy, or a description by category and location, of all documents and tangible things in New Jersey's possession, custody or control that may be relevant to New Jersey's claims and Delaware's defenses. It will be sufficient, if they have already been identified/produced, simply to list them with an indication that they have been produced. Copies shall be provided in paper and, to the extent available, electronic versions. Any documents produced that are available only in electronic form should be produced solely in that form.

APPENDIX D-2
***New Jersey v. Delaware*, No. 134, Original**
Delaware's Initial Disclosures
February 8, 2006

1. State precisely the nature of any defense to New Jersey's claims including a brief factual outline of the defense and a succinct statement of legal issues involved in that defense.

2. Describe in detail, separately as to each, such issue, all statutes, codes, regulations, legal principles, standards and customs for usages, and illustrative case law that Delaware contends are applicable to this action.

3. Provide the name, address and telephone number of each individual state, local and federal government agency, organization, political subdivision or other entity likely to have discoverable information relevant to any disputed facts alleged by New Jersey and currently known to you, identifying separately the subjects of the information as to each person and identity listed.

4. Provide a copy of, or a description by category and location, of all documents and tangible things in Delaware's possession, custody or control that may be relevant to New Jersey's claims and Delaware's defenses. It will be sufficient, if they have already been identified/produced, simply to list them with an indication that they have been produced. Copies shall be provided in paper and, to the extent available, electronic versions. Any documents produced that are available only in electronic form should be produced solely in that form.

5. Provide a detailed factual basis for each defense asserted by Delaware and still maintained.

APPENDIX E
***New Jersey v. Delaware*, No. 134, Original**
Deposition Guidelines
February 8, 2006

1. Cooperation

Counsel will cooperate with each other and exercise civility in all aspects of this litigation.

2. Waiver Stipulations

Unless contrary to an order of the Special Master, the parties (and when appropriate, a non-party witness) may stipulate, in a suitable writing, to alter, amend, or modify any practice relating to noticing, conducting, or filing a deposition. Stipulations for any discovery beyond discovery cutoffs or deadlines set by the Special Master are not valid without approval of the Special Master.

3. Scheduling

Except in extraordinary circumstances, noticing counsel shall consult in advance with counsel for the deponent, if any, and with opposing counsel, so as to schedule depositions at mutually convenient times and places.

4. Attendance

4.1. Who May Be Present

Unless otherwise ordered under Fed. R. Civ. P. 26(c), depositions may be attended by counsel of record, members and employees of their firms, attorneys specially engaged by a party for purposes of the deposition, the parties or the representative of a party, including counsel from the offices of the respective attorneys general, counsel for the deponent, and expert consultants or witnesses. During examination of a deponent about any

document stamped "Confidential – S. Ct. 134" or its confidential contents, persons to whom disclosure is not authorized under section 9 of this CMP shall be excluded.

4.2 Cross-Noticing

A party may cross-notice a deposition. The cross-notice shall be served at least ten (10) days prior to the date noticed for the deposition unless otherwise provided for by an applicable rule or Case Management Order.

5. Conduct

5.1 Examination

Ordinarily, each party should designate one attorney to conduct the principal examination of the deponent. Examination by other attorneys should be limited to situations where designated counsel must leave before the deposition is completed or is otherwise incapacitated.

5.2 Objections and Directions Not to Answer

Counsel shall comply with Fed. R. Civ. P. 30(d)(1). When a claim of privilege is made, the witness should nevertheless answer questions relevant to the existence, extent or waiver of the privilege, including the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged.

5.3 Time Limitations

Depositions must be concluded within a reasonable time limit. At the time of notification, the noticing party will estimate the reasonable amount of time needed for the deposition. In the event any other party considers the proposed amount of time to be unreasonable, the dispute, if unresolved, may be referred to the Special Master pursuant to section 10 of this CMP. Except with prior agreement of counsel or written approval of the Special Master, no deposition may last longer than three (3) eight (8) hour days, provided that no such agreement of counsel may extend any discovery deadline.

5.4 Continuation of Deposition

If a deposition is not finished by the end of the business day, it will continue on the following business day and each business day thereafter, subject to the availability of the witness and time limitations otherwise set by agreement or order of the Special Master. The parties may agree to continue or suspend a deposition until a mutually agreed upon later date, provided that the later date is within any discovery deadline set by the Special Master.

6. Documents

6.1. Production of Documents

All documents should be requested and produced pursuant to sections 6.3 and 6.4 of this CMP. If a non-party witness is believed to have documents not previously produced, a subpoena to produce documents should be

served at least thirty (30) days before the scheduled deposition. Arrangements should be made to permit inspection of the documents by both parties before the deposition begins. Any documents produced in such a manner should be Bates numbered pursuant to section 7 of the CMP.

6.2. Copies

Extra copies of documents about which counsel expects to question the deponent shall be provided to opposing counsel and the deponent at the time of the deposition. Deponents should be shown a document before being examined about it except when counsel are attempting to impeach deponent or test deponent's recollection.

7. Videotaped Depositions

By request in its notice of a deposition, a party may record the deposition as permitted under Fed. R. Civ. P. 30(b)(2) through (4).

7.1 Video Operator

The operator(s) of the videotape recording equipment shall be subject to the provisions of Fed. R. Civ. P. 28(c). At the commencement of the deposition, the operator(s) shall swear or affirm to record the proceedings fairly and accurately.

7.2 Attendance

Each witness and each examining attorney shall be identified on camera at the commencement of the deposition. All others present at the deposition shall be identified off-camera. Thereafter, generally speaking, only the deponent (and demonstrative materials used during the deposition) shall be videotaped.

7.3. Standards

The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a trial. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box other than when reviewing or presenting demonstrative materials for which a change in position is needed. The deposition should be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angles, lens setting, and field of view should be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibit and materials used during the deposition. Sound levels should be altered only as necessary to record satisfactorily the voices of counsel and the deponent. No eating or smoking by deponents or counsel should occur during the deposition.

7.4 Interruptions

The videotape shall run continuously throughout the active conduct of the deposition. Videotape recording shall be suspended during agreed "off the record" discussions.

7.5 Index

The videotape operator shall use a counter on the recording equipment and, after completion of the deposition shall prepare a log, cross-referenced to counter numbers. The log shall identify on the tape where: examination by different counsel begins and ends; objections are made and examination resumes; record certifications are requested; exhibits are identified; any interruption of continuous tape recording occurs; and the reason for the interruption, whether for recesses, "off the record" discussion, mechanical failure, or otherwise.

7.6 Filing

The operator shall send the original videotape in its original condition to the deposing State party in a sealed envelope. No part of a videotaped deposition shall be released or made available to any member of the public or to any unauthorized person, whether marked "Confidential" or not.

7.7 Objections

Requests for ruling on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. Each issue shall be separately submitted. If needed for

a ruling, a copy of the videotape and equipment for viewing the tape (if necessary) shall also be made available to the Special Master.

8. Telephonic Depositions

By stating in the deposition notice that it wants to conduct the deposition by telephone, a party shall be deemed to have moved for an order under Fed. R. Civ. P. 30(b)(7). Notice of a telephonic deposition shall be served at least thirty (30) days before the deposition. Unless an objection is filed and served at least twenty (20) days before the deposition, the motion shall be deemed to have been granted. Other parties may examine the deponent telephonically or in person. All persons present with the deponent shall be identified in the deposition and shall not by word, or otherwise, coach or suggest answers to the deponent.

9. Use

Under the conditions prescribed in Fed. R. Civ. P. 32(a)(1) to (4), as otherwise permitted by the Federal Rules of Evidence, or as agreed to by the parties with approval of the Special Master, depositions may be used against either party.

10. Supplemental Depositions

To the extent a deponent acquires new information, or forms new opinions, or finds new grounds to support previous opinions, any party may move for a supplemental deposition. Such motion shall be made for good cause shown within thirty (30) days of a party's learning of the new information, opinion or grounds from supplemental discovery responses provided under section 14 of this CMP or any other source. If permitted, the supplemental deposition shall be treated as the resumption of the deposition previously taken, but shall not exceed one (1) eight (8) hour day in length. Supplemental

depositions shall not be repetitive of prior examination and repetition of substantially the same examination as previously conducted may result in imposition of monetary and other sanctions.

11. Rulings

Rulings on objections made during a deposition will be resolved according to the procedure set forth in section 11 of the CMP.

No. 134, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF NEW JERSEY,

Plaintiff

v.

STATE OF DELAWARE,

Defendant

OFFICE OF THE SPECIAL MASTER

CASE MANAGEMENT ORDER NO. 2

February 24, 2006

CASE MANAGEMENT ORDER NO. 2

IT IS HEREBY ORDERED THAT:

1. Without objection, the Motion of New Jersey made on February 23, 2006 is GRANTED. On or before March 20, 2006, New Jersey shall file any motion it chooses to make, together with its supporting brief, addressed to Issues of Fact Nos. 1, 2, 6, 8 and 9 and Issue of Law No. 1 set forth by Delaware in its letter of February 17, 2006. Delaware shall file its response to any such motion within thirty (30) days from the filing of said motion by New Jersey and, in any event, no later than April 19, 2006. New Jersey shall file any reply to the aforesaid brief filed by Delaware on or before April 26, 2006. Unless otherwise ordered by the Special Master for good cause shown, briefs shall not exceed twenty-five (25) pages in length.

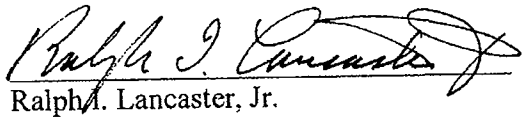
2. The Case Management Plan is hereby amended by adding a new paragraph 16 as follows:

16. Non-dispositive Motions

Before bringing a non-dispositive motion to the attention of the Special Master, the parties shall confer to see whether they can agree on the matter that would be the subject of the motion. It shall be the responsibility of the moving party to initiate the conference. If, as a result of the conference, the parties are in agreement, they shall report the matter by written submission to the Special Master either in the form of a joint motion or in the form of a motion by the initiating party with the concurrence of the other. If the conference does not result in agreement, the moving party shall promptly submit the issue to the Special Master orally by telephone conference call which the moving party shall be responsible for setting up at a time mutually convenient for the parties and Special Master.

3. Any requests for modification or supplementation of this Case Management Order shall be received by the Special Master on or before February 28, 2006.

Dated: February 24, 2006



Ralph I. Lancaster, Jr.
Special Master

Pierce Atwood LLP
One Monument Square
Portland, ME 04101
Tel: (207) 791-1100
Fax: (207) 791-1350
Email: rlancaster@pierceatwood.com

CERTIFICATE OF SERVICE

I, Max B. Walton, hereby certify that on this 6th day of March, 2006, I caused true and correct copies of the State of Delaware's subpoena of Crown Landing LLC to be served upon counsel of record in the manner indicated below:

BY ELECTRONIC MAIL AND
THREE COPIES BY FIRST CLASS MAIL

Rachel J. Horowitz, Esquire
Deputy Attorney General
Richard J. Hughes Justice Complex
25 West Market Street
P.O. Box 112
Trenton, N.J. 08625
Email: Rachel.horowitz@dol.lps.state.nj.us

BY ELECTRONIC MAIL AND
TWO COPIES BY FIRST CLASS MAIL

Barbara Conklin, Esquire
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Richard J. Hughes Justice Complex
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Email: Barbara.conklin@dol.lps.state.nj.us

/s/ Max B. Walton
Max B. Walton